141-679

RECORD, CASE No. 14,456.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1007.

THE HENDERSON BRIDGE COMPANY AND THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF HENDERSON.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 20, 1891.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from Henderson circuit court	1	1
Schedule for transcript	2	1
Petition	2	1
Exhibit A—Ordinance granting Henderson Bridge Company certain rights, &c.	15	8
B—Statement of taxes due	22	11
C—Ordinance providing for tax levies, 1885	24	13
D—Ordinance providing for tax levies, 1886	32	17
E—Ordinance providing for tax levies, 1887	39	21
Order filing amended petition, &c.	47	25
Amended petition	48	26
Exhibit H B—Map	49	26
Answer to original petition	50	26
Order filing reply	61	32
Reply	62	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 13, 1891.

	Original.	Print.
Order filing petition of L. & N. R. R. Co.	65	34
Petition of L. & N. R. R. Co.	65	35
Agreement between L. & N. R. R. Co. and Henderson Bridge Co., February 27, 1884	68	36
Order filing answer to amended petition, &c	71	38
Answer to amended petition	72	38
Rejoinder	72	38
Order setting cause for trial	73	39
Order as to reply, &c.	73	39
Judgment	74	39
Opinion	75	40
Order setting motion for new trial for hearing	76	41
Order continuing motion to file affidavit of M. Yeaman	77	41
Affidavit of M. Yeaman	77	41
Printed article	78	42
Order overruling motion for new trial, &c.	79	43
Affidavit of C. C. Givens	80	43
Order filing bills of exceptions	80	43
Defendant's bill of exceptions	81	43
Affidavit of Malcolm Yeaman	81	44
Printed article	81	44
Affidavit of C. C. Givens	83	44
Judge's certificate	84	44
Plaintiff's bill of exceptions	84	46
Agreement as to depositions	85	46
Deposition of S. S. Eastwood	85	46
C. O. Bradford	91	49
Notary's certificate	97	53
Plaintiff's supersedeas bond	98	53
Supersedeas	101	55
Clerk's certificate	102	56
Statement on appeal	103	56
Orders continuing cause	104	56
Hearing and submission	104	57
Judgment (1st)	104	57
Order filing and submitting petitions for rehearing	104	57
Appellant's petition for rehearing	105	57
Appellee's petition for rehearing	125	60
Judgment (2d)	131	72
Opinion	132	73
Opinion of Holt, C. J.	141	78
Writ of error (copy)	143	78
Bond	145	79
Assignment of errors	146	80
Clerk's certificate	149	81

1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky at the capitol, in the city of Frankfort, on the 7th day of October, A. D. 1890, Chief Justice Wm. H. Holt, Judges Caswell Bennett, Joseph H. Lewis, and William S. Pryor sitting.

THE HENDERSON BRIDGE CO., Appellant,
vs.
CITY OF HENDERSON, Appellee.
} Appeal from Henderson Circuit.

Be it remembered that heretofore, to wit, on the 22nd day of November, A. D. 1888, the appellant, The Henderson Bridge Co., by its attorneys, Yeaman & Lockett, filed in the office of the clerk of the court of appeals of Kentucky its transcript in words and figures following, to wit:

STATE OF KENTUCKY:

Henderson Circuit Court.

Pleas before Hon. M. C. Givens, judge of the Henderson circuit court, at the court-house, in the city of Henderson, Ky., on Wednesday, July 18th, 1888.

Style Suit.

THE CITY OF HENDERSON, Plaintiff,
vs.
THE HENDERSON BRIDGE COMPANY, Defendant.
} In Equity.

2 Be it remembered that on July 19th, 1888, the defendant filed in the clerk's office of the above court its schedule, which reads as follows:

Schedule.

"The clerk of the Henderson circuit court is hereby directed to copy into this transcript for an appeal the entire record in this case. July 19th, 1888.

YEAMAN & LOCKETT,
Att'ys for Defendants."

"Notice of the filing of this schedule is accepted July 19th, 1888.
MONTGOMERY MERRITT,
Of Counsel for Plaintiff."

This action was begun by the filing in the clerk's office of the above court on December 8th, 1887, the plaintiff's petition, which reads as follows:

Petition.

The plaintiff, The City of Henderson, states that the defendant is a corporation created and organized by and under the laws of the

State of Kentucky. Plaintiff states that by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Evansville, Henderson & Nashville Railroad Company, approved Jan. 29th, 1867, and by an act of the said General Assembly entitled "An act authorizing the counties, towns, and cities through or near which the Evansville, Henderson & Nashville railroad may run to issue bonds to aid in building said railroad," approved March 9th, 1867, the said city was authorized to subscribe for stock in said railroad company and to issue its bonds in aid thereof, and to annually levy and collect a tax to pay the interest on said bonds, and the principal, when due, upon all the tax-payers and upon all the property, real and personal, situated
3 within the boundaries of said city, taxable under the revenue laws of this State. Plaintiff says that by authority of said act and in pursuance thereof it did subscribe for stock in said railroad company and issue and sell its bonds to aid in building thereof to the amount of ($300,000.00) three hundred thousand dollars. (2.) The plaintiff states that by an act of the General Assembly of the said Commonwealth of Kentucky entitled "An act to organize and establish a system of public schools in the city of Henderson," approved March 15th, 1869, a school district was established embracing all the territory within the limits of said city, to be under the control of a board of trustees. By said act the said city was authorized to issue her bonds in aid of said school to an amount not exceeding the sum of fifty thousand dollars ($50,000.00) and to levy and collect a tax to pay the interest and principal thereof upon the same property in said city as is taxed by the State for common-school purposes, and was further authorized to levy and collect an annual tax at the rate of not exceeding thirty cents upon each ($100.00) one hundred dollars' worth of said property for the purpose of defraying the yearly expenses of said public schools.

In pursuance of said authority the city did issue and sell her bonds for said purpose to the amount of $——.

(3.) The plaintiff further states that by an act of said General Assembly entitled "An act to incorporate the Henderson Water Works Company," approved April 16th, 1873, the said city was authorized to subscribe to the stock of said company and to issue her
4 bonds in aid thereof to such amount as she might determine, and to levy and collect a tax annually upon all the real and personal property subject to taxation in said city for city purposes. In pursuance of and by authority of said act the said city did issue and sell her bonds to build and equip said works to the amount of one hundred thousand dollars ($100,000.00).

(4.) Plaintiff states that by an act of the General Assembly of the Commonwealth of Kentucky entitled an "Act to amend the charter of the city of Henderson," approved March 9th, 1869, the said city was authorized to issue and dispose of her bonds to any amount not to exceed one hundred thousand dollars ($100,000.00), and in pursuance of said act and by authority thereunder said city did at various times issue and sell her bonds, amounting in the aggregate to the sum of $——, and upon each occasion of issuing and selling

said bonds, before any of same were issued or sold, three-fourths of the common council concurred therein, the yeas and nays called and recorded in the journal of their proceedings, and under the provisions of said amended act the revenues of said city were pledged to the payment of said bonds when due and the interest thereon as the same became due and payable.

(5.) Now plaintiff states that by an act of said General Assembly entitled "An act to authorize the city of Henderson to issue bonds and fund her present indebtedness," approved Jan. 30th, 1878, and the acts amendatory thereof, all of the said bonds of the city issued in pursuance of the acts aforesaid, amounting to about ($500,000.00) five hundred thousand dollars, were funded into bonds de-
5 nominated city funding bonds, and bearing a lower rate of interest, viz., 6 and 5 per cent. bonds. By said act the city was authorized and empowered to annually levy and collect a tax upon all the real estate and personal property in said city subject to taxation under the revenue laws of this State. (6.) Plaintiff further states that by an act of the said General Assembly entitled "An act to amend an act entitled 'An act to amend and reduce into one the several acts concerning the city of Henderson, approved Feb. 11th, 1867, and the several acts amendatory thereto,'" approved March 3rd, 1880, said city was authorized and empowered to annually levy and collect taxes to defray the expenses of the city government at the rate of not exceeding sixty cents on each one hundred dollars' worth of property within the city limits made taxable by — for State purposes, including all amounts taxable under the equalization law, provided that lands not laid off into lots of five acres or less should not be taxed. Plaintiff states that by an act entitled "An act to amend an act entitled 'An act to amend the charter of the city of Henderson,'" approved April 11th, 1882, the city of Henderson was authorized and empowered to levy and collect taxes at the rate of not exceeding 15 cents on the one hundred dollars' worth of property upon all the tax-payers and property in said city taxable under the revenue laws of this State, and said tax so raised to be used for *for* repairing and improving the gas works. The plaintiff states that by the act of the General Assembly approved Feb. 11th, 1867, the city of Henderson was incorporated and the northwestern boundary of said city was fixed at low-
6 water mark on the Indiana side of the Ohio river, and by amendments to said act approved Feb. 14th, 1876, it extended from the water works down the Ohio river, with the meanders thereof at low-water mark on the Indiana side, to Hancock street. Plaintiff further states that by an act of the said General Assembly entitled "An act to incorporate the Henderson Bridge Company," approved Feb. 9th, 1872, said company was authorized to build a bridge across the Ohio river within the said city limits. The said act lay dormant and the incorporators took no steps to organize thereunder until the 21st day of September, 1880, when the Louisville & Nashville Railroad Company, which had purchased the Evansville, Henderson & Nashville railroad, running from Henderson to Nashville, Tennessee, and had also purchased the St. Louis

& Southeastern railroad, running from Evansville, Indiana, to St. Louis, Missouri, got control of said charter and effected an organization thereunder and subscribed for and now own a majority, if not all, the capital stock of said bridge company. On the — day of ——, 1882, the plaintiff, at the instance of the defendant, the said bridge company, passed an ordinance by which it granted to said company the right to construct said bridge and the approach thereto over the center of Fourth street, in the city of Henderson, and on the line thereof extended to low-water mark on the Indiana side of the Ohio river, upon certain terms and conditions, and granted (by said ordinance) to said company the free use of 300 feet above and 100 feet below said bridge, between Water street and the Ohio river, for the purpose — erecting grain elevators and constructing machinery to connect said
7 elevators with the river and the wharf-boats; said elevators were permitted to be built above high-water mark and apparatus and machinery (by this ordinance) permitted to be built to convey grain to and from the river to the elevator, and defendant was allowed to construct floating docks and use the wharf-boats, and the defendant was permitted this space for the landing of boats ladened with grain and produce, and the business of the bridge and the elevators *were* to be conducted free of wharfage, and defendant was granted the free use of this space for any and all other purposes for which it desired to use same. It was expressly agreed in said ordinance that nothing therein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approach to said bridge or any buildings erected by said bridge company with in the corporate limits of said city, the bridge itself and all appurtenances thereto within limits of said city.

Said ordinance was, by written indorsement thereon made by said company, accepted, and said bridge company did, by said written endorsement, accept and agree to perform all the terms and stipulations of said ordinance. A certified copy of said ordinance is herewith filed as a part hereof, marked A. The defendant commenced the construction of said bridge in the year 1883 and completed same in the month of July, 1885, and at a cost of about ($2,000,000.00) two millions of dollars, and on the — day of July, 1885, the first train ran over said bridge. The approach to said bridge is constructed over 4th street, near the principal business portion of said city, commencing at the west line of Main street and extend-
8 ing to the main structure of said bridge at Water street (though, plaintiff claims, not in accordance with the terms of said ordinance). The rights and privileges granted by the plaintiff to the defendant were of great value and the plaintiff was influenced and induced to so grant them by the belief in the right on the part of the plaintiff to tax said bridge as other property is taxed within the city limits.

By the building of said bridge through the rights and privileges so granted by the plaintiff the system of roads north of the Ohio river has been connected with the Louisville & Nashville railroad south of the river, and the said bridge company's property has be-

come so valuable that its bonds to the amount of about $2,000,000.00 are worth a premium of 8½ per cent.

The plaintiff caused said bridge to be assessed by the city assessor for taxation to low-water mark on the Indiana side of the Ohio river, like other property of said city, for the year 1885, and as provided in the acts aforesaid, at a valuation of six hundred thousand dollars, and said property was then worth that amount in cash, and for the year 1886 and 1887 at a valuation each year of ($1,000,000.00) one million of dollars, which was its fair cash value, to pay the interest on the bonded indebtedness aforesaid and to defray the ordinary expenses of the city government and to pay the tax for repairing and inproving the gas works and to defray the annual expense of said public schools.

The tax for the year 1885 amounted to $3,660.00 to pay in-
9 terest on the railroad bonds (or funding bonds, series A), and to $420.00 to pay interest on school bonds (or funding bonds, series B), and to $480.00 to pay interest on water-works bonds (or funding bonds, series D), and to $1,020.00 to pay interest on bonds issued for city purposes (or funding bonds, series C), and to $3,180.00 to defray the expenses of the government of the city, and to $540.00 to pay tax used for repairing and improving gas works, and to $1,200.00 to defray the annual expense of said public schools, which in the aggregate amounts to the sum of $10,500.00. Under the charter of the city of Henderson and the acts amendatory thereto the collector of taxes for said city was authorized and directed to collect a penalty of 1% upon all taxes not paid by the 1st day of October of each year in which same became due and one per cent. for each additional month thereafter until said taxes are collected, and the penalty due by defendant on the aforesaid taxes for the year 1885 amounts to $630.00, making the full amount of taxes and penalty owing by defendant to plaintiff for the year 1885 aggregate the sum of $11,130.00.

The tax on that portion of the bridge within the city limits for the year 1886 amounted to $5,600.00 to pay interest on the railroad bonds (or funding bonds, series A), and to $700.00 to pay interest on school bonds (or funding bonds, series B), and to $1,400.00 to pay the interest on water-works bonds (or funding bonds, series D), and to $1,500.00 to pay interest on bonds issued for city purposes (or funding bonds, series C), and to $5,200.00 to defray the annual expenses of the government of the city, and to $2,000.00 to defray
10 the annual expenses of the public schools aforesaid, which aggregate the sum of $16,400.00, and the penalty due by the defendant for the non-payment of said taxes for 1886 when due amounts to the sum of $984.00, which makes the total tax due by defendant to the city for the year 1886 $17,384.00. The tax on that portion of the bridge within the limits of the city for the year 1887 amounts to $5,200.00 to pay interest on railroad bonds (or funding bonds, series A), and to $200.00 to pay interest on school bonds (or funding bonds, series B), and to $2,000.00 to pay the interest on water-works bonds (or funding bonds, series D), and to $1,500.00 to pay the interest on bonds issued for city purposes (or funding bonds,

series C), and to $5,000.00 to defray the annual expenses of the government of the city, and to $1,600.00 to defray the annual expense of the aforesaid public schools, which aggregate the sum of $15,500.00, and the penalty due the city by the defendant for non-payment of said taxes when due amounts to the sum of $310.00, making the total due for the year 1887 $15,810.00. A statement showing the valuation of the said bridge property and the amount of taxes due the city thereon for each of the purposes aforesaid for the years 1885, 1886, & 1887 is filed herewith as a part hereof, marked (B).

On the 26th day of June, 1885, the said city duly passed and adopted an ordinance providing for the annual tax levies for the year 1885. Said ordinance was duly passed and adopted by a unanimous vote of the entire council, the yeas and nays being called and recorded in the journal of their proceedings, and said ordi-
11 nance was, by order of said common council of said city, published in the Henderson News of date June —, 1885, a newspaper published and printed in the city of Henderson and selected by said city for the purpose of publishing its ordinances and the journal of its proceedings during the year 1885. A copy of said ordinance is filed herewith as a part hereof, marked (C). To pay the taxes due said city for the year 1885 the said city did, by said ordinance, order and direct to be collected the following tax upon all property in said city taxable by law as aforesaid for the purposes aforesaid, viz: An ad valorem tax of 53 cents on the one hundred dollars' worth of property for the purpose of defraying the ordinary expenses of said city; an ad valorem tax of 20 cents on the one hundred dollars to defray the yearly expense of the public schools; an ad valorem tax of 61 cents on the $100.00 to pay interest on railroad bonds (or funding bonds, series A); an ad valorem tax of 8 cents on the $100.00 worth of property to pay interest on water-works bonds (or funding bonds, series D); an ad valorem tax of 7 cents on the $100.00 worth of property to pay interest on school bonds (or funding bonds, series B); an ad valorem tax of 17 cents on the $100.00 worth of property to pay interest on bonds issued for city purposes (or funding bonds, series C); an ad valorem tax of 9 cents on the one hundred dollars' worth of property to pay for repairs and improvements upon the works.

On the 22nd day of June, 1886, the said city duly passed and adopted an ordinance providing for the annual tax levies for the year 1886. Said ordinance was duly passed and adopted
12 by more than ⅔ vote of the entire council, the yeays and nays being called thereon and recorded in the journal of their proceedings, and said ordinance was, by an order of said common council, published in the Henderson News of date June —, 1886, a newspaper printed and published in the city of Henderson and selected by said city for the purpose of publishing its ordinances and the journal of its proceedings during the year 1886. A copy of said ordinance is herewith filed as a part hereof, marked (D).

To pay the taxes due said city for the year 1886 the said city did, by said ordiinance, order and direct to be collected the following tax upon all the property in said city taxable by law as aforesaid and

for the purposes aforesaid, viz: An ad valorem tax of 52 cents on the $100.00 worth of property to pay the annual expenses of the city government; an ad valorem tax of 20 cents on the $100.00 worth of property to pay the annual expenses of the public schools aforesaid; an ad valorem tax of 56 — on the $100.00 worth of property to pay interest on the railroad bonds (or funding bonds, series A); an ad valorem tax of 7 cents on the $100.00 *dollars'* worth of property to pay the interest on the school bonds (or funding bonds, series B); an ad valorem tax of 14 cents on the $100.00 worth of property to pay the interest on the water-works bonds (or funding bonds, series D); an ad valorem tax of 15 cents on the $100.00 worth of property to pay the interest on bonds issued for city purposes (or funding bonds, series C).

On the 11th day of June, 1887, the common council of the city of Henderson duly passed and adopted an ordinance pro-
13 viding for the annual tax levies for the year 1887. Said ordinance was duly passed and adopted by more than $\frac{2}{3}$ of the votes of the entire council, the yeas and *neas* being called thereon and recorded in the journal of their proceedings, and said ordinance was, by an order of said common council, published June —, 1887, in the Weekly Journal, a newspaper printed and published in the city of Henderson and selected by said city for the purposes of publishing its ordinances and the proceedings of its meetings during the year 1887. A copy of said ordinance is herewith filed as a part hereof, marked E. To pay the taxes due said city for the year 1887 the said city did, by said ordinance, order and direct to be collected the following tax upon all the property in said city taxable by law as aforesaid and for the purposes aforesaid, viz: An ad valorem tax of 50 cents on the $100.00 worth of property to pay the annual expenses of the city government.

An ad valorem tax of 16 cents on the $100.00 to defray the annual expenses of the aforesaid public schools; an ad valorem tax of 52 cents on the $100.00 worth of property to pay the interest on the railroad bonds (or funding bonds, series A); an ad valorem tax of 2 cents on the $100.00 worth of property to pay the interest on the school bonds (or funding bonds, series B); an ad valorem tax of 20 cents on the $100.00 worth of property to pay the interest on the water-works bonds (or funding bonds, series D); an ad valorem tax of 15 cents on the $100.00 worth of property to pay the interest on the bonds issued for city purposes (or funding bonds, series C).

14 The tax collector of the city of Henderson has repeatedly demanded payment of the aforesaid taxes and the penalty thereon for each of the aforesaid years from the defendant, but said defendant has repeatedly failed and refused to pay same. Plaintiff states that the defendant owns no other property, real or personal, in this county except the aforesaid bridge; and plaintiff says that by reason of the aforesaid she has a lien upon the said bridge from the beginning of its approach at Main street, in s'd city, to low-water mark on the Indiana side of the Ohio river to pay the aforesaid taxes and the penalty thereon. Wherefore the plaintiff prays

for a judgment against the defendant for the aforesaid taxes and the penalty thereon, aggregating the sum of $44,324.00, with interest from date, for an enforcement of its said lien and a sale thereof to pay said debt, interest, and costs, or for the appointment of a receiver to take charge of said bridge and approach thereto and collect the tolls therefrom or rent same out until the said debt, interest, and costs are paid, — for costs herein expended and for all proper and equitable relief.

BROWN & WARD,
MONTGOMERY MERRITT,
J. L. DORSEY,
Att'ys for Plaintiff.

The affiant, Phelps Sasseen, says that he is the mayor of The City of Henderson, the plaintiff herein, and the statements herein are true.

15 Sworn to before me by the affiant, Phelps Sasseen, Dec. —, 1887.

— —.

The ordinance referred to in the foregoing petition as "A" is here copied as follows:

EXHIBIT "A."

Dav. Hart, C. C., reported to the mayor and council that a certified copy of the bridge ordinance, together with the acceptance of same by the Henderson Bridge Company, had been by M. Yeaman, Esq're, att'y for said company, filed with him, and, on motion, said certified ordinance and acceptance was ordered recorded and filed.

Ayes: Kreipke, Steele, Unverzagt, Thomasson, Katterjohn, Robinson, Lewis, & Johnson (8.)

An ordinance granting the Henderson Bridge Company certain rights and privileges within the corporate limits of the city of Henderson.

Be it ordained by the common council of the city of Henderson, Kent'y—

SEC. 1. That the Henderson Bridge Company organized under the act of the General Assembly of the Commonwealth of Kent'y, approved Feb'y 9th, 1872, be, and they are, hereby granted the right to construct on or over the center of Fourth street in the city of Henderson, and of the line thereof extended to low-water mark on the Indiana side of the Ohio river, such approaches, avenues, piers, trestles, abutments, toll-houses and other appurtenances necessary in the erection of, and for the business, of a bridge over the Ohio river from a point in the city of Henderson to some convenient point on the Indiana side of said river, and for such

16 purposes the use of said Fourth street is hereby granted, subject to the terms and conditions hereinafter expressed.

SECT. 2. That there be, and is hereby, granted to said bridge Co., the right to use the space between Water street in said city and low-

water mark in the Ohio R., extending 100 feet below the center of Fourth street extended, and three hundred feet above the center of s'd street extended to the Ohio river for any purpose required by said company: that said company may erect, or authorize, or cause to be erected, grain elevators within said space above high-water mark, and may construct therefrom to the river such apparatus and machinery as may be necessary to convey grain from boats to such elevators and may have the use of said space for the landing of boats laden with freight for such elevators, and construct floading docks, or use wharf-boats within such space for the accommodation of such boats, and the conduct of the business of such bridge and of the said elevators free of wharfage, subject to the terms and conditions hereinafter expressed.

SECT. 3. That each and all of the rights and privileges herein granted to the said company, their successors or assigns, are on the following terms and conditions to wit:

1st. That the approach to said bridge on Fourth street shall be of sufficient elevation to admit the passage of all vehicles underneath at points where other streets cross or intersect said Fourth street, and shall be so constructed as to admit the passage of all vehicles on said street as far back as the elevation of said bridge will admit of, except as the same may be obstructed by the necessary sup-
17 ports of such approach, which supports shall be iron trustles or masonry piers.

2d. That all or any damage done to private property, by reasons of any privileges granted to said company, shall be paid by said bridge company, and said company shall pay to any owner of private property damaged by reasons of any grant herein, any judgment that may be rendered against the city of Henderson on account thereof, and shall hold said city harmless from any loss or damage by reasons of injury to private property bordering on said street caused by the erection of such bridge and its approaches.

3d. & that any track laid in the space between Water street and low-water mark of the Ohio river mentioned in the second section of this ordinance, or any improvements made thereon, shall be so made as not to interfere with the free use of such space by the public further than the nature of such works and their convenience for the said uses may absolutely requirs.

4th. That any such elevator, other buildings and appurtenances of said bridge, shall be kept above high-water mark and so as not to obstruct the current of the river, and nothing herein shall be construed to prevent the said city from paving or otherwise improving that part of the river front herein mentioned, or from charging and collecting wharfage from boats or other craft landing thereat, except as herein provided in favor of said bridge company.

5th. That in the event said city shall determine to grade and pave the river front mentioned between the line of high-water mark and the line of low-water mark, the said company
18 shall so change any tracks they may have laid, or fixe any

improvements they may have made, to conform to, and with such grade as near as practicable, and the said company shall so arrange said tracks and improvements, in such event, as to make the least possible obstruction to the free passage of vehicles and to such other uses for which said space may be designed.

SECT. 4. That nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city.

SECT. 5. That before any of the rights or privileges here-before granted shall inure to the benefit of, or vest in the Henderson Bridge Company, said company shall be proper authority, append to a certified copy of this ordinance their acceptance of, and agreement to abide by, and faithfully keep the terms and conditions of this ordinance, which acceptance and agreement shall be acknowledged by the proper authority of said company as provided in case of a deed under the laws of Kent'y, and delivered to the clerk of the Henderson city council.

SECT. 6. That this ordinance shall take effect and be in force after the same shall have been published as approved by law, and after the terms and conditions thereof shall have been accepted and acknowledged as herein provided.

19 A true copy.

[Seal of the City of Henderson, Henderson Co., Ky.]

Att.: DAVID HART, *C. C.*,
By ALLIN HART, *D. C.*

The Henderson Bridge Company hereby accepts the foregoing ordi*a*nce of the common council of the city of Henderson and agrees to abide by and faithfully keep the terms and conditions of said ordinance.

In witness whereof the Henderson Bridge Company has caused its corporate seal to be to these presents affixed and the same to be subscribed by its president and secretary this 11th day of Feb'y, A. D. 1882.

[Seal Henderson Bridge Company.]

HENDERSON BRIDGE COMPANY,
By E. P. ALEXANDER, *Pres't.*
Attest: S. S. EASTWOOD, *Sect.*

STATE OF KENTUCKY, } ss:
Jefferson County, }

I, Geo. H. Webb, clerk of the county court of Jefferson county, in the State of Kent'y, do hereby certify that before me personally appeared E. P. Alexander, with whom I am personally acquainted and to me known to be the president of the Henderson Bridge Company, and who produced to me the within and foregoing instrument, and which said E. P. Alexander, pres't as aforesaid, then and there

acknowledged to be the act and deed of said Henderson Bridge
20 Company and to be his act and deed a- pres't of said company, and said E. P. Alexander further acknowledged that he signed the name of said company and his name as president of said company thereto by order of the board of directors of said company and upon his authority as president for the purposes therein named and consented that the same might be recorded; and on the same day personally came S. S. Eastwood, who, being duly sworn by me, did depose and state that he is secretary of the Henderson Bridge Company, and produced the within and foregoing instrument and then and there signed and acknowledged the same to be his act and deed as sec't'y of the Henderson Bridge Company, and did depose and state that he resides in the city of Louisville and State of Kent'y, and that as sect. aforesaid he did, in pursuance of a resolution of the board of directors of the Henderson Bridge Company, affix the corporate seal of said comp'y to the within and foregoing instrument, and that the seal so affixed is the proper seal of said company, and that E. P. Alexander is the pres't of said company, and that his signature to the said deed is in his handwriting, and that he was duly authorized by the board of directors of said company to sign, execute, and deliver the same. All of which is hereby certified to the proper office for record.

In witness whereof I have hereunto set my hand and affixed the official seal of said court, at office, in Louisville, this 13th day of Feb'y, 1881.

[Seal Jefferson County, Kentucky.]

GEO. H. WEBB,
Clerk Jefferson County Court.

21 STATE OF KENT'Y, *Henderson County,* } *sct:*

I, Geo. W. Smith, clerk of the Henderson county court, do certify that the foregoing instrument of writing from the city of Henderson, Kent'y, to the Henderson Bridge Company was this day lodged in my office for record, and the same is, with this and the foregoing certificates thereon endorsed, truly recorded in my office.

Witness my hand this 17th day of Feb'y, 1882.

GEO. W. SMITH, *C. H. C. C.*

A true copy from the record of the common council of the city of Henderson, Ky., of date February 21st, 1882.

Attest: J. B. JOHNSTON, *C. C.*,
p. F. W. RENTLINGER, *D. C.*

22 Exhibit "B," filed with the plaintiff's petition, is now copied as follows:

EXHIBIT "B."

"The following is a statement of the city taxes due the city of Henderson, Ky., by the Henderson Bridge Company for the year 1887 on the following-described property, to wit, listed as one

bridge structure and its approach, consisting of the masonry, piers, and iron structure thereon, and is on the line of 4th street and extending to low-water mark on the Indiana shore, valued at $1,000,000.00; rate of taxation for said year on the one hundred dollars' worth of property, $1.55, making the total tax $15,500.00; 2 per cent. penalty that has accrued since Oct. 1, '87, $310.00; making the total tax for said year $15,810.00.

Property.	Valuation.	Rate.	Recapitulation.	Am't tax.	Total tax.
1887 taxes.	$1,000,000	.50	City revenue tax	$5,000 00	
	1,000,000	.20	W. W. bond "	2,000 00	
	1,000,000	.52	R. R. bond "	5,200 00	
	1,000,000	.16	Public school "	1,600 00	
	1,000,000	.02	School bond "	200 00	
	1,000,000	.15	City funding bond tax	1,500 00	
	Total	$1 55	Total	$15,500 00	
			2 per cent. penalty accrued since Oct. 1, '87	$310 00	$15,810 00

23 Statement of said Henderson Bridge Company, city taxes due the city of Henderson for the year 1886 on the following-described property, to wit: Listed as one bridge structure and its approach, consisting of the masonry, piers, and iron structure thereon, and is on the line of 4th street and extending to the low-water mark on the Indiana shore, valued $1,000,000; rate of taxation for said year on the one hundred dollars' worth of property, $1.64; making total tax $16,400.00; — per cent. penalty added thereon, $984.00; making the total tax for said year $17,384.00.

Property.	Valuation.	Rate.	Recapitulation.	Am't tax.	Total tax.
1886 taxes.	1,000,000	.52	City revenue tax	$5,200 00	
	1,000,000	.14	W. W. bond "	1,400 00	
	1,000,000	.56	R. R. bond "	5,600 00	
	1,000,000	.20	Public school "	2,000 00	
	1,000,000	.07	School bond "	700 00	
	1,000,000	.15	City funding bond tax	1,500 00	
	Total	$1 64	Total tax	$16,400 00	
			6 per cent. penalty added to same	984 00	
					$17,384 00

Statement of said Henderson Bridge Company, city taxes due the city *the city* of Henderson, Ky., for the year 1885, which was assessed by the city assessor for said year on the following-described property, to wit: One bridge, listed as unfinished; said unfinished bridge is situated along the line of 4th street, in the city of Henderson, Ky., and extending to low-water mark on the Indiana shore, valued at

$600,000.00; rate of taxation for said year on the one hundred dollars' worth of property, $1.75; making a total of $10,500.00; — per cent. penalty added, that has accrued since Oct., '85, $630.00; making the total tax for said year 1885, including the — % penalty, $11,130.00.

Property.	Valuation.	Rate.	Recapitulation.	Am't. tax.	Total tax.
1885 taxes.	$600,000.	53	City revenue tax	$3,180 00	
	600,000	08	W. W. bond "	480 00	
	600,000	61	R. R. bond "	3,660 00	
	600,000	20	Public school "	1,200 00	
	600,000	07	School bond "	420 00	
	600,000	09	Gas fund tax	540 00	
	600,000	17	City funding bond tax	1,020 00	
	Total	$1 75		$10,500 00	
			% penalty added on same	630 00	
					$11,130 00

Recapitulation for 1885, 1886, & 1887.

Taxes.

Amount	1885 tax	$11,130 00
"	1886 "	17,384 00
"	1887 "	15,810 00
Total due		$44,324 00

P. R. YANEY, *C. T. C.*"

Exhibit "C," filed with plaintiff's petition, is here copied as follows:

EXHIBIT "C."

"An ordinance providing the annual tax levies for the fiscal year 1885 was placed on its first reading. Motion — Mr. Kreipke adopted: That the rules be suspended and said ordinance for tax levy 25 be placed on its 2d reading.

Ayes: Johnson, Kreipke, Sasseen, Winstead, Williamson, Manion, Fallon, & Baldauf—8.

Said tax ordinance was then placed on its 2d reading and, — motion Mr. Sasseen adopted: That said tax ordinance be adopted as read.

Ayes: Johnson, Kreipke, Sasseen, Winstead, Williamson, Manion, Fallon, & Baldauf—8.

Motion — Mr. Winstead adopted: That the ordinance providing the annual tax levies for the fiscal year 1885, as adopted at this meeting of the council, be published in the Henderson News.

Ayes: Johnson, Kreipke, Sasseen, Winstead, Williamson, Manion, Fallon, & Baldauf—8.

An ordinance providing the annual tax levies for the fiscal year 1885.

[SEAL.] Be it ordained by the common council of the city of Henderson—

SECT: 1ST. That an ad valorem tax of fifty-three (53) cents on the one hundred dollars, be and the same is hereby levied and ordered to be collected on all property assessed for city purposes for the year 1885 as reported by the assessor of the city of Henderson, corrected by the board of supervisors and approved by the common council, and in addition thereto a head or personal tax of two dollars on every male inhabitant of the city of Henderson twenty-one years of age and over, who shall have resided three months within
26 said city, which tax shall be devoted to, and used exclusively to the purpose of defraying the current and ordinary expenses of the city of Henderson for the current fiscal year beginning the first day of July, 1885, and ending the first day of July, 1886.

SECT: 2D. That an ad valorem tax of twenty (20) cents on the one hundred dollars, be and the same is hereby levied and ordered to be collected on the value of all property of white persons assessed for school purposes for the year 1885, as reported by the assessor of the city of Henderson, corrected by the board of supervisors, and approved by the common council, for the purpose of defraying the yearly expenses of the public school of the city of Henderson for the current fiscal year 1885, which schools were established under an act of the General Assembly of the Commonwealth of Kentucky entitled, "An act to organize and establish a system of public schools in the city of Henderson," approved March 15th, 1869; said tax shall be devoted to, and used exclusively for said purpose and no other.

SECT. 3D. That an ad valorem tax of sixty (60) cents on the one hundred dollars be and the same is hereby levied and ordered to be collected on the value of all the property of negro-s and mulattoes resident in the city of Henderson and situated therein, assessed for colored school purposes as reported by the assessor for the year 1885, and corrected by the board of supervisors and approved by the common council, and in addition thereto a tax of two dollars on every male negro or mulatto over the age of eighteen years, resident of the city of Henderson; which tax is levied and ordered to
27 be collected under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to establish a public school for colored children in the city of Henderson," approved March 10th, 1871. Said tax shall be devoted to and used exclusively for the purposes set forth in said act and no other.

SECT. 4TH. That an ad valorem tax of sixty-one (61) cents on the one hundred dollars be, and the same is, hereby levied and ordered to be collected on the value of all the real estate and personal property in said city subject to taxation under the revenue laws of Kentucky, including the amount owned by residents of said city which is taxed by the State under the equalization law, assessed for rail-

road purposes for the year 1885, as reported by the city assessor, corrected by the board of supervisors and approved by the common council; said tax shall be devoted to and used exclusively for the payment of the current semi-annual interest for the current or fiscal year 1885 on such of the bonds issued by the city of Henderson under and by authority of an act of the legislature of Ky., entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto, approved February 7th, 1880, and April 22d, 1880, as have been exchanged for bonds issued by said city for railroad purposes, under and by authority of an act of the General Assembly of the Commonwealth of Ky., entitled "An act authorizing the counties, town and cities through or near which the Evansville, Henderson & Nashville railroad may run, to
28 issue bonds to aid in building said railroad" and such of the bonds issued by said city under the last-named act as have not yet been exchanged for said funding bonds; and upon the bonds not yet exchanged no greater rate of interest than 5 (five) per cent. per annum is herein provided for.

SECT. 5TH. That an ad valorem tax of eight (8) cents on the one hundred dollars, be and the same is hereby levied and ordered to be collected upon the value of all real estate and personal property subject to taxation in the city of Henderson assessed for city purposes for the year 1885, as reported by the city assessor, corrected by the board of supervisors and approved by the common council, for the purpose of paying the current and semi-annual interest for the current, or fiscal year 1885, upon such of the bonds issued by the city of Henderson under and by authority of an act of the legislature of Kentucky entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto, approved February 7th, 1880, and April 22d, 1880, as have been exchanged for the bonds issued by the city of Henderson for water-works purposes under and by virtue of an act passed by the legislature of Ky., entitled "An act to incorporate the Henderson Water Works Company," approved April the 16th, 1873, which tax shall be devoted to and used exclusively *to* the purpose aforesaid, and none other.

SECT: 6TH. That an ad valorem tax of seven (7) cents on the one hundred dollars be, and the same is, hereby levied and ordered to be collected on the value of all property of white persons
29 assessed for school purposes for the year 1885, as reported by the assessor, corrected by the board of supervisors, and approved by the common council for the purpose of paying the current semi-annual interest for the current or fiscal year 1885 upon such of the bonds issued by the city of Henderson under and by authority of an act of the legislature of Kentucky entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto, approved February 7th, 1880, and April 22d, 1880, as have been exchanged for the bonds issued by the city of Henderson by authority of the act of the Kentucky legislature, entitled "An act

to organize and establish a system of public schools in the city of Henderson" approved March 15th, 1869, which tax shall be devoted to, and used exclusively for the purposes aforesaid and none other.

SECT: 7TH. That an ad valorem tax of seventeen (17) cents on the one hundred dollars be, and the same is, hereby levied and ordered to be collected on the value of all property assessed for city purposes for the year 1885, as reported by the assessor, corrected by the board of supervisors, and approved by the common council, for the purpose of paying the current and semi-annual interest for the current or fiscal year 1885, upon such of the bonds issued by the city of Henderson under — by authority of an act of the legislature of Kentucky entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto, approved February 7th, 1880, and April 22d, 1880, as have been exchanged for the bonds
30 issued by the city of Henderson under and by authority of an act of the legislature of Kentucky, entitled "An act to amend the charter of the city of Henderson," approved March 9th, 1869, which tax shall be devoted to and used exclusively for said purpose and no other.

SECT: 8TH. That an ad valorem tax of nine (9) cents on the one hundred dollars in value be and the same is hereby levied and ordered to be collected upon all the property of the tax-payers of the city of Henderson, taxable under the revenue laws of this State, assessed for the year 1885, as reported by the city assessor, corrected by the board of supervisors, and approved by the common council, which tax shall be devoted to and used exclusively *to* the repair and improvement of the gas work- belonging to said city, and such other public improvements as the council of said city may determine; said tax is levied and ordered to be collected by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the charter of the city of Henderson," approved April 11th, 1882, and shall be devoted exclusively to the purposes set forth in said act, and no other.

SECT: 9TH. That the council clerk shall within thirty days from the passage of this ordinance make out alphabetical lists of all persons liable for the taxes which in this ordinance are levied and ordered to be collected, containing the number and description of the levies, the aggregate value of the taxable property of each person, the amount of tax due thereon, the names of all males over the age of twenty-one years, and the names of all negroes and mulat-
31 toes over the age of eighteen years, who are liable for poll tax, and he will certify the correctness thereof over his official signature, and deliver said lists to the collector of taxes of the city of Henderson and take such collector's receipt therefor.

SECT: 10TH. That the collector of taxes shall from and after the date he receives the tax-lists aforesaid, proceed to collect said taxes in accordance with the provisions of the charter of the city of Henderson, the amendments thereto, and the ordinance of said city gov-

erning the collection of taxes, and shall pay over to the persons authorized to receive the same, said taxes as they are collected.

SECT: 11TH. That said collector be, and he is hereby allowed a commission of three per cent. on all taxes collected by him, except on poll or capitation taxes of persons not owning or listing other property subject to taxation, on which latter class he shall be allowed a commission of twenty-five per cent.

SECT: 12TH. That several tax levies hereinbefore provided and made; shall apply to all persons and property the listing of which have been omitted by the city assessor, and which may be hereafter listed.

SECT: 13TH. That this ordinance shall take effect, and be in force from and after its publication in the Henderson News.)

A true copy from the record of the common council of the city of Henderson, Ky., of date June 26th, 1885.

Attest: J. B. JOHNSTON, *C. C.*,
p. F. W. RENTLINGER, *D. C.*

32 Exhibit "D" filed with plaintiff's petition is here copied as follows:

EXHIBIT "D."

"First reading of ordinances being called, an ordinance providing the annual tax levies for the fiscal year 1886 was placed on its first reading and was read.

Motion Mr. Winstead adopted: That the rules be suspended and said ordinance providing the tax levy for the fiscal year 1886 be placed on its 2d reading. Ayes, Kimmel, Adams, Johnson, Huston, Sasseen, & Winstead—6; nays, Manion—1.

Mr. Williamson was absent from council chamber when the above vote was taken.

Said ordinance providing the annual tax levies for the fiscal year 1886 was then placed on its 2d reading and read. Motion Mr. Sasseen adopted: That said tax-levy ordinance be adopted as read. Ayes, Williamson, Kimmel, Adams, Johnson, Huston, Sasseen, & Winstead—7; nays, Manion—1.

[SEAL.]

Motion Mr. Winstead adopted: That the ordinance providing the annual tax levies for the fiscal year 1886, as adopted at this meeting of the council, be published in the Henderson News and spread on the record. Ayes, Williamson, Kimmel, Adams, Johnson, Huston, Sasseen, & Winstead—7; nays, Manion—1.

Copy.

33 An ordinance providing the annual tax levies for the fiscal year 1886.

Be it ordained by the common council of the city of Henderson, Ky.—

SECT: 1ST. That an ad valorem tax of (52) fifty-two cents on the one hundred dollars worth be, and the same is, hereby levied and ordered to be collected upon the property within the limits of the city of Henderson made taxable by law for State purposes, including all amounts taxable untler the equalization law, except land outside the ten acre lots, as originally laid off, which is not divided or laid out into lots of five acres or less, assessed for city purposes for the year 1886, as reported by the assessor of the city of Henderson, corrected by the board of supervisors, and approved by the common council, and in addition thereto, a head or personal tax of two dollars on every male inhabitant of the city of Henderson 21 years of age and over, who shall have resided three months within said city: which tax is levied under and by authority of the charter of the city of Henderson and amendments thereto, approved March 3d, 1880, and shall be devoted to, and used exclusively for the purpose of defraying the current and ordinary expenses of the city of Henderson for the fiscal year beginning the 1st day of July 1886 and ending the first day of July 1887.

SECT: 2D. That an ad valorem tax of (20) twenty cents on the one hundred dollars worth be, and the same is hereby levied and ordered to be collected on all property of white persons that is now taxed by the State for common school purposes, situate in the city of Henderson assessed for school purposes for the year 1886,
34 as reported by the assessor of the city of Henderson, corrected by the board of supervisors, and approved by the common council, for the purpose of defraying the yearly expenses of the public schools of the city of Henderson for the current fiscal year beginning the 1st day of July 1886 and ending the 1st day of July 1887; which tax is levied and ordered to be collected under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to organize and establish a system of public schools in the city of Henderson," approved March 15th, 1869, and amendment thereto, approved February 27th, 1880; and said tax shall be devoted and used exclusively for said purpose and no other.

SECT: 3RD. That an ad valorem tax of (60) sixty cents on the one hundred dollars worth be, and the same is, hereby levied and ordered to be collected upon the property owned by all negroes and mulattoes resident in the city of Henderson and situated therein, the same tax which is imposed upon similar property by the general revenue laws of this State, assessed for colored school purposes for the year 1886, as reported by the assessor of the city of Henderson and corrected by the board of supervisors and approved by the common council, and in addition thereto, a tax of two dollars on every male negro or mulatto, over the age of eighteen years, resident in the said city; which tax is levied and ordered to be collected, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to establish a public school for colored children in the city of Henderson," approved March 10th, 1871, the proceeds of which taxes shall
35 constitute a fund for the education of the children of negroes

and mulattoes, resident in said city, and shall be devoted to and used exclusively for said purpose and no other.

SECT: 4TH. That an ad valorem tax of (56) fifty-six cents on the one hundred dollars' worth be, and the same is hereby levied, and ordered to be collected of the value of all the real estate and personal property, in the city of Henderson subject to taxation under the revenue laws of Kentucky, including the amount owned by residents of said city which is taxed by the State under the equalization law assessed for railroad purposes for the year 1886 as reported by the assessor of the city of Henderson, corrected by the board of supervisors and approved by the common council, which tax shall be devoted to, and used exclusively for the payment of the current semi-annual interest for the current or fiscal year 1886 on such of the bonds issued by the city of Henderson under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto approved February 7th, 1880 and April 22d, 1880, as have been exchanged for bonds issued by said city for railroad purposes, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act authorizing the counties, towns and cities through or near which the Evansville, Henderson & Nashville railroad may run, to issue bonds to aid in building said railroad.

SECT: 5TH. That an ad valorem tax of (14) fourteen cents
36 on the one hundred dollars' worth be, and the same is hereby levied and ordered to be collected upon the value of all real estate and personal property subject to taxation in the city of Henderson for city purposes for the year 1886, as reported by the assessor of the city of Henderson, corrected by board of supervisors and approved by the common council, which tax is levied and ordered to be collected for the purpose of paying the current semi-annual interest for the fiscal year 1886, upon such of the bonds issued by the city of Henderson, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878 and amendments thereto, approved February 7th, 1880 and April 22d, 1880, as have been exchanged for the bonds issued by said city for water-works purposes, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled, "An act to incorporate the Henderson Water Works Company," approved April 16th, 1873, which tax shall be devoted to, and used exclusively for said purpose and no other.

SECT: 6TH. That an ad valorem tax of (7) seven cents on the one hundred dollars' worth be, and is hereby, levied and ordered to be collected on all property of white persons that is now taxed by the State for common-school purposes, situated in the city of Henderson, assessed for school purposes, for the fiscal year 1886, as reported by the assessor of the city of Henderson, corrected by the board of su-

pervisors, and approved by the common council, for the pur-
37 pose of paying the current semi-annual interest for the fiscal year beginning 1st. day of July 1886, and ending the 1st, day of July 1887, upon such bonds issued by the city of Henderson, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled, "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto, approved February 7th, 1880, and April 22d. 1880, as have been exchanged for the bonds issued by said city, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to organize and establish a system of public schools in the city of Henderson," approved March 15th 1869; which tax shall be devoted to, and used exclusively for said purpose, and no other.

SECT: 7TH. That an ad valorem tax of (15) fifteen cents on the one hundred dollars worth be, and the same is hereby levied and ordered to be collected on the value of all property assessed for city purposes for the year 1886, as reported by the assessor of the city of Henderson, corrected by the board of supervisors and approved by the common council for the purpose of paying the current semi-annual interest for the current or fiscal year 1886, upon such of the bonds issued by the city of Henderson under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act authorizing the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and amendments thereto, approved February 9th 7th 1880, and April 22d. 1880, as have been exchanged for the bonds issued
38 by the city of Henderson under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the charter of the city of Henderson," approved March 9th, 1869, which tax shall be devoted to, and used exclusively for said purpose, and no other.

SECT: 8TH. That the council clerk shall, within thirty days from the passage of this ordinance, make out alphabetical lists of all persons liable for the taxes which in this ordinance are levied and ordered to be collected; containing the number and description of the levies, the aggregate value of the taxable property of each person, the amount of taxes due thereon, the names of all males over the age of twenty-one years, and the names of all negroes and mulattoes over the age of eighteen years, who are liable for poll-tax: and he will certify the correctness thereof over his official signature, and deliver said lists to the collector of taxes of the city of Henderson and take said collector's receipt therefor.

SECT: 9TH. That the collector of taxes shall, from and after the date he receives the tax-lists aforesaid, proceed to collect said taxes in accordance with the provisions of the charter of the city of Henderson, the amendments thereto, and the ordinances of said city governing the collection of taxes, and shall pay over to the persons authorized to receive the same said taxes as they are collected.

SECT: 10TH. That said collector be, and he is, hereby allowed a

commission of three per cent. on all taxes collected by him, except on poll or capitation taxes of persons not owning or listing other property subject to taxation, on which latter class he shall be allowed a commission of twenty-five per cent.

SECT: 11TH. That the several tax levies hereinbefore provided and made, shall apply to all persons and property, the listing of which have been omitted by the city assessor, and which may be hereafter listed.

SECT: 12TH. That this ordinance shall take effect and be in force from and after its publication in the Henderson News.

A true copy from the record of the common council of the city of Henderson, Ky., of date June 22d, 1886.

[Seal of the City of Henderson, Henderson County, Ky.]

Attest: J. B. JOHNSTON, *C. C.*,
p. F. W. RENTLINGER, *D. C.*"

Exhibit "E" filed with plaintiff's petition is here copied as follows:

EXHIBIT "E."

COUNCIL CHAMBER, *June 7th*, 1887.

At a regular meeting of the common council of the city of Henderson, Ky., held in the council chamber June 7th, 1887.

Present at roll-call: Hon. C. C. Ball, mayor, & Councilmen Fenwick, Williamson, Manion, Johnson, & Sasseen—5.

Mess. Kimmel & Adams came in during the reading of the minutes.

First reading of ordinances being called, an ordinance providing the annual "tax levies" for the fiscal year 1887 was placed on its first reading and was read. Motion — Mr. Johnson "adopted." That when council adjourn to adjourne to meet Saturday night, June 11th, 1887, for the further consideration of said tax ordinance. Ay-s: Fenwick, Williamson, Manion, Kimmel, Adams, Johnson, Sugg, & Sasseen—8.

On motion council adjourned to meet Saturday night, June 11th, 1887.

(Signed) C. C. BALL, *Mayor.*
J. B. JOHNSTON, *C. C.*

COUNCIL CHAMBER, *June 11th*, 1887.

At an adjourned regular meeting of the common council of the city of Henderson, Ky., held in the council chamber June 11th, 1887.

Present at roll-call: Hon. C. C. Ball, mayor, & Councilmen Fenwick, Williamson, Manion, Kimmel, Adams, Johnson, Sugg, & Sasseen—8.

Motion — Mr. Sasseen "adopted:" That the rules be suspended and "an ordinance" providing the annual tax levies for the fiscal year 1887 be placed on its 2nd reading. Ay-s: Fenwick, Williamson, Manion, Kimmel, Adams, Johnson, Sugg, and Sasseen—8.

An ordinance providing the annual tax levies for the fiscal year

1887 was then placed on its 2d reading and was read. Motion — Mr. Sasseen that an ordinance providing the annual tax levies for the fiscal year 1887 as read at this meeting be "adopted."

Ay-s: Fenwick, Williamson, Manion, Kimmel, Adams, Johnson, Sugg, & Sasseen—8.

Motion — Mr. Sasseen "adopted:" That an ordinance providing the annual tax levies for the fiscal year 1887, as adopted at this meeting, be published in "The Weekly Journal." Ay-s: Fen-
41 wick, Williamson, Manion, Kimmel, Adams, Johnson, Sugg, & Sasseen—8,

Copy.

An ordinance providing the annual tax levies for the fiscal year 1887.

Be it ordained by the common council of the city of Henderson, Ky.:

SECT. 1ST. That an ad valorem tax of 50 cents on each one hundred dollars' worth of the property assessed for taxation for city purposes for the year 1887 as shown by the assessor's book of the city of Henderson, corrected by the board of supervisors of tax and approved by the common council, be, and the same is hereby levied and directed to be collected on all property within the limits of the city of Henderson made taxable by law for State purposes, including all amounts taxable under the equalization law, to be paid by the owners of said property respectively; provided however, that no land embraced in the city limits and outside of the ten-acre lots as originally laid off shall be assessed and taxed by the common council unless the same is divided or laid off into lots of five acres or less, nor shall the court-house or public square belonging to the county be taxed. And in addition to the above a head or personal tax of two dollars is hereby levied and ordered to be collected on every male inhabitant of the city of Henderson twenty-one years of age and over who shall have resided within said city for three months next before the 10th day of January, 1887. All taxes provided for in this section are levied by and under authority of the charter of the city of Henderson and amendments thereto
42 approved March 3rd, 1880, and shall be devoted to and used exclusively for the purpose of defraying the current and ordinary expenses of the city of Henderson for the fiscal year beginning the first day of July, 1887, and ending the first day of July, 1888.

SEC. 2ND. That an ad valorem tax of 16 cents on each one hundred dollars' worth of the property assessed for taxation for school purposes for the year 1887 as shown by the assessor's book of the city of Henderson, corrected by the board of supervisors of tax and approved by the common council, be, and the same is hereby levied on all the property within the city of Henderson, Ky., taxed by the State of Kentucky for common-school purposes, including property listed or estimated under the equalization law, to be paid by the owners of said property respectively. The tax provided for in this section shall be devoted to and used exclusively for the purpose of

defraying the yearly expenses of the white and colored public schools in the city of Henderson for the current fiscal year beginning the first day of July, 1887, and ending the first day of July, 1888.

SEC. 3RD. To provide for the payment of the interest on that class of bonds issued by the city of Henderson denominated "funding bonds, series A," an ad valorem tax of 52 cents on each one hundred dollars of value of the property assessed for taxation for the purpose of paying interest on the said "funding bonds, series A," for the fiscal year 1887 as shown by the assessor's book of the city of Henderson, corrected by the board of supervisors of tax and approved by the common council, be, and the same is hereby
43 levied and directed to be collected upon all the real estate and personal property in the city of Henderson, subject to taxation under the revenue laws of the State of Kentucky including the amounts owned by residents of the city which is taxed by the said State under the equalization law. The tax mentioned in this section is to be paid by the owners of said property respectively, and shall be devoted exclusively to the payment of the current semi-annual interest for the fiscal year 1887 on the bonds denominated "funding bonds series A," issued by the city of Henderson in exchange for railroad bonds, under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to authorize the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and the amendments thereto approved respectively February 7th, 1880, and April 22nd, 1880.

SEC. 4TH. To provide for the payment of the interest on that class of bonds issued by the city of Henderson denominated "funding bonds series B," an ad valorem tax of 2 cents on each one hundred dollars of value of the property assessed for taxation for the purpose of paying interest on said "funding bonds series B," for the fiscal year 1887 as shown by the assessor's book of the city of Henderson, corrected by the board of supervisors of tax and approved by the common council, be, and the same is hereby levied and directed to be collected upon all real estate and personal property in said city subject to taxation under the revenue laws of the State of Kentucky, except estate listed under the equalization law shall not be taxed for the purposes mentioned in this section. The tax
44 mentioned in this section to be paid by the owners of said property respectively and devoted exclusively to the payment of the current semi-annual interest upon the bonds denominated "funding bonds series B," issued by the city of Henderson in exchange for school bonds under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to authorize the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878, and the amendments thereto approved respectively February 7th, 1880, and April 22d, 1880.

SEC. 5TH. To provide for the payment of the interest on that class of bonds issued by the city of Henderson and denominated "fund-

ing bond- series C," an ad valorem tax of 15 cents on each one hundred dollars of value of the property assessed for taxation for the purpose of paying the interest on said "funding bonds series C," for the fiscal year 1887 as shown by the assessor's book of the city of Henderson, corrected by the board of supervisors of tax and approved by the common council, be, and the same is hereby levied and directed to be collected upon all the real estate and personal property in the city of Henderson subject to taxation under the revenue laws of the State of Kentucky except that estate listed under equalization law shall not be taxed for the purposes mentioned in this section. The tax provided for in this section is to be paid by the owners of said property respectively and devoted exclusively to the payment of the current semi-annual interest upon the bonds denominated "funding bonds, series C," issued by the city of Henderson in exchange for Henderson city bonds
45 under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to authorize the city of Henderson to issue bonds and fund her present indebtedness" approved January 30th, 1878, — the amendments thereto approved respectively February 7th, 1880, and April 22nd, 1880.

SEC. 6TH. To provide for the payment of the interest on that class of bonds issued by the city of Henderson denominated "funding bonds, series D," an ad valorem tax of 20 cents on each one hundred dollars of value of the property assessed for taxation for the purpose of paying the interest on said "funding bonds, series D," for the fiscal year 1887 as shown by the assessor's book of the city of Henderson, corrected by the board of supervisors of tax and approved by the common council be, and the same is, hereby levied and directed to be collected upon all the real estate and personal property in the city of Henderson subject to taxation under the revenue laws of the State of Kentucky, except that estate listed under the equalization law shall not be taxed for the purposes mentioned in this section. The tax provided for in this section is to be paid by the owners of said property respectively and devoted exclusively to the payment of the current semi-annual interest upon the bonds denominated "funding bonds, series D," issued by the city of Henderson in exchange for water-works bonds under and by authority of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to authorize the city of Henderson to issue bonds and fund her present indebtedness," approved January
30th, 1878, and the amendments thereto approved respect-
46 ively February 7th, 1880, and April 22nd, 1880.

SEC. 7TH. The taxes provided for in the first section of this ordinance shall be paid by the collecting officer to the treasurer of the city of Henderson. The taxes provided for in the second section of this ordinance shall be paid by the collecting officer to the "treasurer of the board of trustees of Henderson public schools" and his receipt taken therefor. The taxes mentioned and provided for in the third, fourth, fifth and sixth sections of this ordinance shall be paid by the collecting officer to the treasurer of the board of sinking-fund commissioners, and his receipt taken therefor, and

said treasurer shall hold and use the same exclusively for the payment of the interest on the funding bonds therein mentioned.

SEC. 8TH. The clerk of the common council shall within 19 days after the passage of this ordinance make out alphabetical lists of taxes which by this ordinance are levied and ordered to be collected, containing the number and description of the levies, the aggregate value of taxable property of each person, the amount of taxes due thereon, the names of all the males of twenty-one years of age and over, and he will certify the correctness thereof over his official signature, and deliver said lists to the collector of taxes of the city of Henderson and take his receipt therefor.

SEC. 9TH. The collector of taxes shall from and after the time he receives the tax-lists named herein, proceed to collect said taxes in
accordance with the provisions of the charter of the city of
47 Henderson, the amendments thereto and the ordinances of
said city regulating and control-ing the collection of taxes.
And he shall pay over said taxes as they are collected to the persons to whom he is directed by this ordinance to pay same.

SEC. 10TH. The collector of taxes is hereby allowed a commission of 3 per cent. on all taxes collected by him, except on poll or head taxes of persons not owning or listing other property subject to taxation on which latter class of taxes he shall be allowed a commission of 25 per cent.

SEC. 11TH. The several tax levies made and provided for in this ordinance, shall apply to all persons and property, the listing of which has been omitted by the city assessor and to all persons and property which may be hereafter listed for taxation for the fiscal year 1887.

SEC. 12TH. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

SEC. 13TH. This ordinance shall be published in the Weekly Journal and be in force and take effect from and after said publication.

A true copy from the record of the common council of the city of Henderson, Ky., of date June 7th & 11th, 1887.

[Seal of the City of Henderson, Henderson County, Ky.]

Attest: J. B. JOHNSTON, *C. C.*

At the January term, 1888, of the Henderson circuit court, to wit, Wednesday, Jan'y 4th, 1888, the following order was entered herein:

Order.

The plaintiff filed his amended petition and Exhibits "H"
48 and "B." The defendant filed his answer to the original petition and is granted further time to answer the amended petition.

The amended petition mentioned in the foregoing order is here copied as follows:

Amended Petition.

"The plaintiff, by leave of the court, amends her petition, and for amendment says that the distance from the beginning of the bridge approach at Main street to low-water mark on the Kentucky shore of the Ohio river is 820.5 feet, and the distance from low-water mark on the Kentucky shore to low-water mark on the Indiana shore is 1,585 feet, making the total distance from the beginning of the approach at Main street to low-water mark of the Indiana shore of the Ohio river a distance of 2,405.5 feet, and this entire distance of 2,405.5 feet is covered by the said bridge and the approach thereto, all of which is within the corporate limits of the city of Henderson, Ky. A plat or diagram of the said brid-e and approach thereto, showing portions of Main, Water, & Fourth streets, also showing that portion of the Ohio river and the low-water marks on either shore beneath or in front of the extension of 4th street, is herewith filed as a part hereof, marked H. B.

Wherefore the plaintiffs prays as in her petition.

BROWN & WARD,
MERRITT,
DORSEY,
Att'ys for the Plaintiff."

49 It is agreed by plaintiff's and defendant's attorneys that Exhibit "H. B.," referred to and filed with the foregoing amended petition, may be attached and become a part of this transcript, which is accordingly done.

See next page.

(Here follows map marked p. 49.)

50 The answer to the original petition referred to in the foregoing order is here copied as follows:

Answer to Original Petition.

The defendant, The Henderson Bridge Company, for its answer to the petition of the plaintiff, The City of Henderson, says:

1. That all of the bonds that were ever issued by the plaintiff, The City of Henderson, under and by virtue of the several legislative acts pleaded in the 1st, 2nd, and 3rd paragraphs of said petition, viz., the act entitled "An act to incorporate the Evansville, Henderson & Nashville Railroad Company," approved January 29th, 1867; the act entitled "An act authorizing the counties, towns, and cities through or near which the Evansville, Henderson & Nashville railroad may run to issue bonds to aid in building said railroad," approved March 9th, 1867; the act entitled "An act to organize and establish a system of public schools in the city of Henderson," approved March 15th, 1869; an act entitled "An act to incorporate the Henderson Water Works Company," approved April 16th, 1873, and

an act entitled "An act to amend the charter of the city of Henderson," approved March 9th, 1869, were, long prior to the 1st of January, 1885, surrendered to and cancelled by the city of Henderson and no bonds are now or since, prior to the 1st of January, 1885, have been in existence which were issued under or by virtue of either one of said acts, and the defendant submits that any ordinance passed by the common council of the city of Henderson since January 1st, 1885, which levies or attempts to levy any tax on defendant's property to pay the interest on any part of any of the bonds issued
51 under any of said acts was authorized and of no effect.

2. That there is not now and has not been since prior to the 1st of January, 1885, any bonds in existence issued by the city of Henderson except only such as were issued under and by virtue of an act of the legislature of Kentucky entitled "An act to authorize the city of Henderson to issue bonds and fund her present indebtedness," approved January 30th, 1878; that under the authority conferred by said act the plaintiff, The City of Henderson, did, prior to 1st of January, 1885, take and assume as a part of her ordinary municipal debt all of the bonds which had been previously issued under and by virtue of all of the legislative acts pleaded in the 1st, 2nd, and 3rd paragraphs of plaintiff's petition and recited in the 1st paragraph of this answer and thereupon issued her own municipal bonds in lieu of the bonds which had been issued under said several acts, and the defendant submits that the plaintiff has no authority whatever to levy or collect any tax to pay the interest on any bonds except such bonds as may have been issued under and by virtue of said last-mentioned act.

3. That defendant does not admit that the provisions of the several legislative acts pleaded by plaintiff are correctly set forth in plaintiff's petition. Defendant pleads and refers to the whole of said several acts, so far as they are material, and submits that under their provisions the defendant is not liable for any part of the tax sued for.

4. That defendant does not deem it material, but says that it is not true, that the Louisville & Nashville Railroad Company
52 got control of the Henderson Bridge Company's charter, nor that said railroad company effected an organization under said bridge charter, and defendant denies that said railroad company ever purchased the St. Louis & Southeastern railroad, running from Evansville, Indiana, to St. Louis, Missouri.

5. That as to the terms of the grant of the city of Henderson to the Henderson Bridge Company, the defendant, without admitting that they are correctly set forth in the petition, refers to and makes a part hereof the whole of said grant, a copy of which is filed with the petition, and refers thereto for a correct statement of its terms and conditions. But as to the grant of the use of 300 feet above the 100 feet below said approach to said bridge between Water street and the Ohio river for the purpose of erecting grain elevators, and for other uses specified in said grant, defendant says that no part of any of said spaces of 300 feet and 100 feet has ever been used by the defendant for any purpose; that none of the elevators or other struct-

ures have ever been erected, and that the whole of both said spaces belong to the plaintiff, subject to defendant's right to use them according to the terms of said grant, and they are now and always have been entirely under the control and use of the plaintiff. Defendant admits that whenever it should elect to use said spaces by erecting elevators or other structures thereon that said structures would be subject to taxation by the plaintiff. It is true that said grant specifies that nothing therein shall be construed as waiving the right of the plaintiff to levy and collect taxes on the ap-
53 proach to said bridge or any building erected by said bridge company within the limits of said city, the bridge itself, and all appurtenances thereto, in the city limits; but said provisions were only intended to mean, and defendant submits that they in fact only do mean, that the plaintiff did not waive the right to levy and collect a tax upon such part of defendant's property as would by law be taxable had not said provision been embodied in said grant, and that it was not intended by said provision that the defendant should concede, and the defendant in fact did not concede, that any part of its property would under said provision be taxable, which, without said provision, would not by law be subject to taxation. It is not true that the plaintiff was influenced or induced to make said grant in the belief in the right on the part of the plaintiff to tax said bridge any further than such part of defendant's property might, by law, be subject to taxation. It is not true that the plaintiff caused said bridge or any part thereof to be assessed to low-water mark on the Indiana shore of the Ohio river for the years 1885, 1886, and 1887, or for either of said years. Defendant alleges that the whole of any such alleged and pretended assessments were and are void and of no effect.

6. It is not true that said bridge was completed at a cost of two million dollars, or anything like that sum. Defendant says that the total length of said bridge from the beginning of the approach at or near the west or northwest line of Main street to the terminus of the bridge in Indiana is $3{,}698\frac{7}{10}$ feet; that from the beginning of the approach at or near the west or the northwest line of Main
54 street to the beginning of the main structure or bridge proper on the Kentucky shore is $503\frac{7}{10}$ feet, and from the beginning of the main structure, or bridge proper, on the Kentucky shore to low-water mark on the Indiana shore of the Ohio river is 1,968 feet, making the total length of said bridge, including the said approach commencing at or near the west or northwest line of Main street to low-water mark on the Indiana shore of the Ohio river, $2{,}471\frac{7}{10}$ feet and no more. It is not true that when the alleged assessment was made for the year 1885 the said bridge was worth the sum of $600,000, for defendant says that at that time and for a long time thereafter said bridge was in an unfinished condition; that only a portion of the said bridge had then been completed, and, in fact, said bridge was not then nor until a long time thereafter in existence, and the work that had been commenced toward its construction was of no value whatever, except as it might be made valuable by the subsequent construction and completion of the bridge;

that the fair cash value of the property included in the alleged assessment for the years 1886 and 1887 is now and was at the time said two assessments were made the sum of $649,735.54 and no more—that is to say, the fair cash value of said approach of $503\frac{7}{10}$ feet in length was the sum of $10,229.72 and no more, and the fair cash value of the remainder of said bridge to low-water mark on the Indiana shore of the Ohio river, being 1,968 feet in length, was $639,505.82 and no more.

And as to said alleged assessments for all of said years 1885, 1886, and 1887, the defendant says they were made without any
55 notice to or knowledge whatever of this defendant, and that said alleged assessments are greatly in excess of the value of the property; and it is not true that in either of said years the plaintiff caused said bridge to be assessed for taxation like other property, nor as is provided for in the several acts pleaded by the plaintiff.

7. It is not true that any tax which the plaintiff assessed or had the right to assess on the said bridge or on any part thereof for the year 1885 amounted in the aggregate to the sum of $10,500, nor that any penalty thereon amounted to $630, nor that the taxes so assessed for the year 1886 amounted in the aggregate to the sum of $16,400, nor that any penalty thereon amounted to the sum of $984; nor that any tax so assessed for the year 1887 amounted in the aggregate to the sum of $15,500, nor that any penalty thereon amounted to the sum of $310. The plaintiff had no right or authority to levy or collect any part of any of said sums for any or either of said years of taxes or penalties. And it is not true that by reason of any of said alleged assessments the plaintiff has a lien upon the said bridge from the beginning of its approach at Main street to low-water mark on the Indiana shore of the Ohio river, nor upon any part of said bridge or approach.

8. And for further answer the defendant says that the whole of its bridge sought to be taxed and subjected by plaintiff's petition, except that part described in the petition as the "approach constructed over 4th street, near the principal business portion of said city, commencing at the west line of Main street and extending to the main structure of said bridge at Water street," is constructed
56 upon stone piers or pillars resting upon the bed of the Ohio river. The water under and at each side of said bridge and for the whole length thereof is nowhere less than five feet deep, and varies from that to over fifty feet deep. The ground or bed of the river upon and over which said bridge is constructed and on both sides of said bridge is not now and never has been and never can be laid out into streets, alleys, or lots, nor can any part thereof be occupied as place or places of residence or business; that the bed of said river over which said bridge is erected is not used or necessary to be used and can never be used as a passway from any part of the city of Henderson to any other part of said city. The plaintiff, The City of Henderson, has not a population of exceeding ten thousand inhabitants, and the said bridge does not connect with any city or town on the Indiana side of the river, and owing to the topography

of the ground on the Indiana side of the river said bridge cannot be reached from that side except by a trestle-work at least three miles long and averaging twenty feet in height. Said bridge was built only for the purpose of laying a single railroad track thereon, on which to move locomotives and cars between Kentucky and Indiana over the Ohio river, and only one railroad track has been or ever can be laid thereon; that said bridge has never been and never can be used for the passage of persons or vehicles, nor for any purpose whatever except as a railroad bridge; that said bridge nor any part thereof is lighted by gas or otherwise, and defendant patrols the said bridge day and night by its own officers, employed and paid by defendant, and defendant does not now and never
57 has required or received and never can receive any assistance from the police force of the city of Henderson, except as to said approach, described in the petition as "commencing at the west line of Main street and extending to the main structure of said bridge at Water street," and that part of defendant's bridge between the Kentucky and Indiana shores derives no benefit, protection, or advantage whatever from the government of the city of Henderson; and the defendant submits that the plaintiff has no right or authority to subject the same to taxation.

9. That the said bridge is located as required by and is constructed in conformity with the two acts of the Congress of the United States, the one entitled "An act to authorize the construction of bridges across the Ohio river and to prescribe the dimensions of the same," approved December 17th, 1872, and the other entitled "An act supplemental to an act approved December 17th, 1872, entitled An act to authorize the construction of bridges across the Ohio river and to prescribe the dimensions of the same," approved February 14th, 1883; that the whole of said bridge between the Kentucky shore and the Indiana shore, being 1,968 feet in length, is over the water of the Ohio river, except the piers or pillars which support the said bridge, and the said piers or pillars are built in and rest upon the bed of said river; that the said river is a navigable stream, and the entire control of and jurisdiction over said river is vested and rests in the Congress and the courts of the United States, and the said bridge is only used to transport persons and freight in railroad cars between the States of Indiana and Kentucky, and the plaintiff,
58 The City of Henderson, has no control or jurisdiction over said river or any part thereof or over the said bridge or the persons or freight being transported thereon, except in the matter of executing her writs from her police authorities; and the defendant submits that for the plaintiff to assume to tax and subject that part of said bridge would be violative of the Constitution of the United States, the laws of Congress, and of defendant's rights in the premises.

10. That for the reasons hereinbefore alleged the defendant's said bridge derives no benefit, protection, or advantage whatever from the government of the plaintiff, The City of Henderson, and that to subject its said property to the payment of the claim set forth in the petition would be to take private property for public use without

just compensation and would be violative of article 5 of the amendments to the Constitution of the United States, as well as violative of the constitution and laws of the State of Kentucky and of the defendant's rights in the premises.

11. The defendant states that there is a defect of parties defendant in this action; that The Louisville & Nashville Railroad Company ought to be made a party defendant to this action. Said The Louisville & Nashville Railroad Company is a proper and necessary party to this action. The defendant states that when it constructed said bridge it was the settled law of the State of Kentucky that so much of its bridge and property as were erected and stood across the Ohio river was not liable to municipal or city taxation, it having been so decided by the court of appeals of Kentucky
59 in the case of The Louisville Bridge Company *vs.* The City of Louisville, reported in 81 Ky., p. 189. The defendant states that its property lies partly in the State of Kentucky and partly in the State of Indiana, and consists of what is known as the Kentucky approach and the bridge spanning the Ohio river and a connecting railroad from the Indiana terminus of the bridge to a junction with the Southeast and St. Louis railway, near the city of Evansville, in the State of Indiana, said connecting railroad being $9\frac{36}{100}$ miles in length, and said connecting railroad is of great value, to wit, the sum of $——. The defendant further says that relying on the law of the State of Kentucky as being settled as aforesaid, and that neither said bridge property nor any part of it was or would ever be liable to be taxed by the city of Henderson, and the Louisville & Nashville Railroad Company relying upon the same settled law and the same fact that said bridge property nor any part of it was or would ever be liable to be taxed by the city of Henderson, on the 27th day of February, 1884, the said The Louisville & Nashville Railroad Company and the defendant, The Henderson Bridge Company, entered into a written contract, a copy of which is made a part hereof and filed herewith, marked "Agreement," for the maintenance and operation of the said bridge and connecting railroad of the defendant. By said agreement, among other things, it was stipulated and agreed between the defendant and the said The Louisville & Nashville Railroad Company that the said defendant should pay to the Louisville & Nashville Railroad Company each year during the continuance of said contract the sum of ten
60 thousand dollars ($10,000.00) per annum, which amount so to be received, or such part thereof as should be required, the said railroad company agreed, in each year during the continuance of said contract, to apply to keep and maintain the track and road-bed of said connecting railroad in good condition and repair, and toward the usual and ordinary repairs to and upon said bridge required from time to time from usual and ordinary wear and tear and not otherwise, and to pay all taxes imposed upon said track or bridge structure and each of them; and if said $10,000.00 should not be sufficient therefor, said The Louisville & Nashville Railroad Company was bound by said contract to make up the deficiency and to pay all of said taxes and keep said property in repair. This con-

tract took effect on the completion of said connecting railroad and bridge by the defendant, and is to continue in effect until the 1st day of September, 1931. If this court should decide that the plaintiff has a right to recover in this case it will make the taxes on and expenses for the repairs to said bridge and connecting railroad cost the Louisville & Nashville Railroad Company very much more than the amount the defendant is to pay it therefor according to said contract, because, in addition to the taxes thus sought to be imposed by the city of Henderson on so much of said property as lies within the corporate limits of the city of Henderson, the said The Louisville & Nashville Railroad Company has annually to pay and does pay for the defendant the State and county taxes in Kentucky, and also State, county, and township taxes in the State of Indiana, on so much of said bridge as lies in the State of
61 Indiana and on the whole of said connecting railroad, and the controversy in this case between the plaintiff and the defendant cannot be determined without prejudice to the rights of the Louisville & Nashville Railroad Company; and, furthermore, to grant the plaintiff the relief prayed for or any part thereof would be a direct impairment of the obligation of said contract between the defendant and the Louisville & Nashville Railroad Company and violative of the rights of said The Louisville & Nashville Railroad Company. The defendant asks that the plaintiff be required to make the Louisville & Nashville Railroad Company a party defendant to this action. Defendant prays that the plaintiff's petition be dismissed, for judgment for its costs herein expended, and for all proper and equitable relief.

YEAMAN & LOCKETT,
Attorneys for Defendant.

STATE OF KENTUCKY, }
Jefferson County, } *ss:*

M. H. Smith says that he is president of the defendant, The Henderson Bridge Company, and that he believes the statements in the foregoing answer are true.

M. H. SMITH.

Sworn to and subscribed before me by M. H. Smith this 29th day of December, 1887.

WM. MAGUIRE,
Notary Public, Jefferson County, Kentucky.

At a January term, 1888, to wit, Wednesday, Jan'y 11th, 1888, the following order was entered herein:

Order.

62 "The plaintiff filed its reply."

The reply mentioned in the foregoing order is here copied as follows:

Reply.

"The plaintiff, The City of Henderson, for reply to the 1st and 2nd paragraphs of defendant's answer, says it is true the original bonds mentioned have been cancelled. They were not paid off, but were only funded under the authority of the said act approved Jan. 30th, 1878, and the holders of said bonds took in exchange for them said funding bonds. By an act of the General Assembly of the Commonwealth of Kentucky approved April 22nd, 1880, it is provided that the holders of said funding bonds shall be entitled to the same liens and priorities as given the holders of the original bonds, and that said funding bonds should be so designated by endorsement as to preserve said liens and priorities, and they were when issued so designated, as stated in the petition. The plaintiff denies that by issuing said funding bonds she took up and assumed as part of her ordinary municipal debt said original bonds issued under the acts aforesaid, or that said funding bonds are, properly speaking, municipal bonds.

Replying to the 5th paragraph of defendant's answer, the plaintiff says she has claimed the right all the while to tax the defendant as other property is taxed within the city limits, and intended to and did assert her claim of right in said ordinance and contract. She denies that the assessment of defendant for either the years 1885, 1886, or 1887 is void.

Replying to the 6th paragraph of defendant's answer, the plaintiff denies that $10,229.72 is the fair value of said approach
63 of 503.7 feet, or that $639,505.82 is the fair value of said bridge from said approach to low-water mark on the Indiana side of the river. The plaintiff denies that said assessments were made without the knowledge of the defendant. The defendant had no officer in Henderson county nor any agent known to plaintiff upon whom the assessor could call to assess said bridge, but she says the defendant well knew that said bridge had been assessed for the year 1885 when the assessor was assessing for 1886, and knew that it had been assessed for the year 1886 when the assessor assessed same for the year 1887.

Replying to the 8th paragraph of defendant's answer, the plaintiff denies that the whole of said bridge except the approach is upon stone piers or pillars resting upon the bed of the Ohio river, but says only a portion thereof is so situated. She denies that the defendant has never required or received or can never receive any assistance from the police force of the plaintiff except as to said approach, or that portion of defendant's bridge between the Kentucky and Indiana shores derives no benefit, protection, or advantage from the government of the city of Henderson. It enjoys the same advantages and benefits and receives the same protection that all other property in the city enjoys and receives.

Replying to the 9th and 10th paragraphs of defendant's answer, plaintiff denies that Congress and the courts of the U. S. have entire and exclusive control over said river, and that she has no con-

trol or jurisdiction over same or said bridge except in the
64 matter of executing her writs from her police authorities, but says she has by express legislative authority, as stated in her petition, the same right thereover and the right to tax the same as she has over any other property within the city limits, and she denies in taxing same she would be violating any provision of the Constitution of either the United States or the State of Kentucky.

Replying to the 11th paragraph of defendant's answer, plaintiff denies that there is a defect of parties in this action or that the Louisville and Nashville Railroad Co. is a necessary party thereto, but plaintiff has no objection to said railroad company making itself a party on its own motion. Plaintiff denies that when defendant constructed said bridge it was the law of the State of Kentucky that so much of its bridge and property as were erected and stood across the Ohio river was not liable to municipal or city taxation, or that it had been so decided by the court of appeals of Kentucky in the case of The Louisville Bridge Co. *vs.* The City of Louisville or in any other case.

The plaintiff submits that the Louisville bridge case is not analogous to and is not an authority applicable either to the law or facts of this case.

The plaintiff denies that defendant relied upon the law of Kentucky as being settled as aforesaid that said brid-e was not or would never be liable to taxation by the city of Henderson in making the contract with the L. & N. R. R. Co. mentioned in the answer, but if it did the plaintiff is no way responsible for the defendant's or the L. & N. R. R. Co.'s erroneous interpretation of the law or what the law as to taxation of said bridge was or should be. The
65 plaintiff denies that taxation by the plaintiff of defendant would be impairing an obligation of the said contract. The L. & N. R. R. Co. owns the entire capital stock of said bridge company.

The plaintiff prays as in her petition.

JNO. L. DORSEY,
BROWN & WARD,
MONTGOMERY MERRITT,
Att'ys for Plaintiff."

At a subsequent day of said January term, 1888, to wit, Thursday, Jan'y 19th, 1888, the following order was entered herein:

Order.

"The Louisville & Nashville Railroad Company filed its petition, and on its motion it is made a party defendant hereto, and said petition is taken as its answer."

The petition mentioned in the above order is now copied as follows:

Petition L. & N. R. R. Co.

"The petitioner, The Louisville & Nashville Railroad Company, says that it is a proper and necessary party defendant to this suit; and the said Louisville & Nashville Railroad Company states that when the bridge described in the petition and answer, being the bridge of the defendant, The Henderson Bridge Co., was constructed it was the settled and established law of the State of Kentucky that so much of said bridge property as was erected upon the bed of the Ohio river and stood across the Ohio river was not liable to municipal or city taxation; that the law of the State of Kentucky
66 had been so settled and held by the court of appeals of the State of Kentucky, which was the court of last resort in said State, in the case of The Louisville Bridge Co. against The City of Louisville, reported in the 81 vol. of the Kentucky Reports, at page 189.

That the said bridge of the Henderson Bridge Company lies partly in the State of Kentucky and partly in the State of Indiana, and consists of an approach to said bridge commencing at Main street, in the city of Henderson, and extending 503.7 feet toward and to the Ohio river, and of the bridge proper, spanning the Ohio river; and the said bridge Co. also constructed and now owns a railroad of 9.36 miles in length, which connects the northern or Indiana terminus of said bridge with the St. Louis and Southeastern railway near Evansville, Indiana, said connecting railroad being of great value, viz., the sum of $——; that the said Louisville & Nashville Railroad Company, relying upon the law of Kentucky as being settled, as hereinbefore stated, and believing and relying upon the fact that the said bridge so spanning the Ohio river was not and would never be legally liable to be taxed by the city of Henderson, did, on the 27th Feb'y, 1884, enter into and execute a contract with the defendant, The Henderson Bridge Company, for the maintenance and operation of the said bridge and connecting railroad of the Henderson Bridge Co. By said contract, among other things, it was expressly stipulated and agreed by and between the Louisville & Nashville Railroad Company and the said Henderson Bridge Company that the said bridge Co. should pay to the said
67 railroad Co. each year during the continuance of said contract the sum of ten thousand dollars per annum, which amount or such part thereof as should be required the said railroad company agreed in each year during the continuance of said contract to apply to keep and maintain the track and road-bed of said connecting railroad in good condition and repair and toward the usual and ordinary repairs to and upon said bridge required from time to time by reason of usual and ordinary wear and tear, and not otherwise, and to pay all taxes legally imposed upon said track and bridge structure, and if said sum of $10,000.00 should not be sufficient therefor that the said Louisville & Nashville Railroad Company would make up the deficiency and pay all of said taxes and keep said property in repair. In said contract it is stipulated

that if such repairs and taxes in any year shall exceed such amount of ten thousand dollars no further sum should be advanced by said bridge Co. to said railroad Co. for said purposes if thereby the gross income of the said bridge Co. would be reduced below the sum of one hundred and ninety thousand dollars, and if said gross income would thereby be reduced below said sum of $190,000.00, then the said railroad company should furnish such further amounts without claim for repayment. Said contract took effect on the completion of said connecting track and bridge, and is still in force, and by its terms is to remain in force and effect until the 1st day of September, 1931. A true copy of said contract is filed with the answer of the defendant, The Henderson Bridge Co., as exhibit marked "Agreement," and said copy is now here referred to and made a part hereof.

68 That if this court should decide that the plaintiff has a right to recover in this action it will make the taxes on and expenses for the repairs to said bridge and connecting railroad cost this petitioner very much more than the said sum of $10,000.00, and that this petitioner cannot demand of said bridge Co. any part of said excess for the reason that for said bridge company to pay any part of said excess would reduce the gross income of said bridge company below the said sum of $190,000.00 per annum.

That to grant the plaintiff the relief prayed for or any part thereof would be a direct impairment of the obligation of said contract between the petitioner and the Henderson Bridge Co. and violative of the right of this petitioner.

This petitioner prays that it be made a party defendant to this action and admitted to defend this action; that this petition be taken and read as and for its answer to plaintiff's petition; that upon final hearing the plaintiff's petition be dismissed, and for all proper and equitable relief.

YEAMAN & LOCKETT,
Att'ys for L. & N. R. R. Co."

The exhibit or agreement filed with the answer and referred to in the foregoing petition is here copied as follows:

Agreement.

"This agreement, made this twenty-seventh (27th) day of Feb-uary, in the year one thousand eight hundred and eighty-four, between the Louisville & Nashville Railroad Company, a corporation duly incorporated under the laws of Kentucky, party of the first part, hereinafter called the railroad company, and the

69 Henderson Bridge Company, a corporation likewise incorporated under the laws of the State of Kentucky, hereinafter called the bridge company, the party of the second part, witnesseth:

Whereas the said bridge company is about to proceed with the erection of a bridge over the Ohio river at or near Henderson, in the State of Kentucky, and of a railroad connecting the Henderson division of the Louisville and Nashville Railroad Company at the

city of Henderson, in the State of Kentucky, with the Southeast and St. Louis railway in or near the city of Evansville, in the State of Indiana;

And whereas certain railroad companies, including the party of the first part, have, by agreement, guaranteed to the said bridge company an income from traffic amounting to two hundred thousand dollars per annum;

And whereas it is deemed for the interest of all parties, and has been requested by the bondholders under the mortgage on said bridge, that the party of the first part should assume the control, management, and care of the track of the said railroad so to be constructed and should effect the usual and ordinary repairs to said bridge caused by usual and ordinary wear and tear and pay taxes imposed on said track and the structure of said bridge on compensation being made therefor by said bridge company as herein provided:

Now, therefore, the said bridge company hereby agrees with the said railroad company to pay to the said railroad company absolutely and in each year during the continuance of this agree-
70 ment, in equal quarter-yearly payments, upon the first days of January, April, July, and November, the sum of ten thousand dollars per annum, which amount so to be received or such part thereof as shall be required the said railroad company agrees, in each year during the continuance of this contract, to apply to keep and maintain the track and road-bed of said railroad in good condition and repair and toward the usual and ordinary repairs to and upon said bridge required from time to time from usual and ordinary wear and tear, and not otherwise, and to pay all taxes imposed on said track or bridge structure and each of them, the said railroad company not being required, however, under this agreement or any clause thereof to replace or repair any extraordinary loss or injury or to rebuild said bridge or to make other repairs than those required from usual and ordinary wear and tear.

And it is further agreed that if such repairs and taxes in any year shall exceed such amount of ten thousand dollars so to be paid in any event no further sum will be advanced by said bridge company to said railroad company for such purposes in case thereby the gross income of the said bridge would be reduced below one hundred and ninety thousand dollars; and, if so, the said railroad company hereby agrees to furnish such further amounts, if any, as shall be required, without claim for repayment therefor, to keep and maintain said track and road-bed in good condition and repair and to make the usual and ordinary repairs to and upon said bridge caused by usual and ordinary wear and tear, and not otherwise, and to pay all taxes imposed upon said bridge or railroad.

71 This contract to take effect on the completion of the railroad and bridge by the said bridge company and to continue in effect until the first day of September, in the year one thousand nine hundred and thirty-one.

In witness whereof the said railroad company has hereunto set its

corporate seal and caused these presents to be executed by its president, thereunto duly authorized.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

By C. C. BALDWIN, *President.*

Attest:

[SEAL.] A. M. QUARRIER, *Assistant Secretary.*

THE HENDERSON BRIDGE COMPANY,

By M. H. SMITH, *President.*

Attest: S. S. EASTWOOD, *Secretary.*

[Seal of the Henderson Bridge Company.]

A true copy of the original.

Attest: EASTWOOD, *Sec'ty.*"

At a subsequent day of said January term, 1888, to wit, Monday, Jan'y 30th, 1888, the following orders was entered herein:

Order.

"The defendant bridge company filed its answer to the amended petition and also its rejoinder."

The answer to the amended petition mentioned in the foregoing order is here copied as follows:

Answer to Amended Petition.

"Defendant, for answer to plaintiff's amended petition, says that the ground that lies under and on both sides of said bridge between the western or northwestern end of said approach and low-water mark on the Kentucky shore of the Ohio river is broken, rugged, inaccessable, unimproved, and incapable of being laid off into lots, streets, or alleys, or used for any purpose whatever.

Defendant prays as in its original answer.

YEAMAN & LOCKETT,
For Defendant."

The rejoinder mentioned in the foregoing order is here copied as follows:

Rejoinder.

"The defendant, for rejoinder to plaintiff's reply, says:

1. That as to the provisions in the act approved April 22nd, 1880, that the holders of said funding bonds shall be entitled to the same liens and priorities as were given the holders of the original bonds, the facts are that the act approved April 16th, 1873, under which the 'water-works bonds' were originally issued, provided that 'said water works shall' stand pledged to secure the payment 'of said bonds' issued under that act.

The holders of the said water-works bonds apprehended that if they surrendered them and accepted the funding bonds they would lose their lien and priority upon and pledge of the water works as

a security, and to avoid that result and at the instance solely
73 of the holders of said water-works bonds the act of April 22nd, 1880, was procured to be passed; that said 'pledge' of the water works was the only lien or priority that ever existed in favor of the holders of any of the bonds ever issued by the city of Henderson, and said act was passed for the purpose aforesaid and for no other; all of which will appear by the several acts pleaded by plaintiff.

2. It is not true that the Louisville and Nashville Railroad Company owns the entire capital stock of this defendant. The stock of the Henderson Bridge Company consists only of 10,000 shares of the par value of $100 each, of which the Louisville & Nashville Railroad Company owns 5,010 shares, and no more. Defendant prays as in its answer.

YEAMAN & LOCKETT,
For Defendant."

At a subsequent July term, 1888, of said court, to wit, Saturday, July 7th, 1888, the following order was entered herein:

Order.

"Ordered that this case be set for trial on the 13th day of the present term."

At a subsequent day of said July term, 1888, to wit, Monday, July 16th, 1888, the following order was entered herein:

Order.

"By agreement of plaintiff its reply to the answer of the Henderson Bridge Company is to be taken as its reply to the answer of the L. & N. Railroad Company, and the rejoinder of the Henderson Bridge Company, filed Jan'y 29th, 1888, to the reply of the plaintiff is to be taken as the rejoinder of the L. & N. Railroad Company to said reply."

74 At a subsequent day of said July term, 1888, to wit, Wednesday, July 18th, 1888, the following order was entered herein:

Order — Trial.

"This cause coming on to be heard upon the pleadings, evidence, and argument of counsel, and the court, being sufficiently advised, adjudges that, the Henderson bridge being in an incomplete state the 10th day of January, 1885, the plaintiff was not entitled to tax same for said year; but as to the years 1886 and 1887 the court adjudges that the same and the approach thereto were subject to taxation for all the purposes and for the amounts claimed in the plaintiff's petition. It is therefore adjudged that the plaintiff has a lien upon said bridge structure and masonry piers and the approach thereto situated within its boundary, extending to low-water mark on the Indiana side of the Ohio river, for the sum of $17,384.00 for

the year 1886, and for the further sum of $15,810.00 for the year 1887, with interest on said sums from this date and for its costs herein expended. The defendant The Henderson Bridge Company is hereby ruled and directed to pay said sums, with interest and costs aforesaid, to the plaintiff on or before the first day of the October term, 1888, of this court.

The defendants The Henderson Bridge Co. and the Louisville & Nashville Railroad Co. object and except to the foregoing judgment and pray an appeal to the court of appeals, and the plaintiff object- and except- to so much of the judgment as fails to allow the taxes for 1885, prays a cross-appeal, both of which *is* granted. The court filed its written opinion."

75 The opinion mentioned in the foregoing order is now copied as follows:

Opinion.

"That cities are a part and parcel of the machinery of State governments is not now and never has been an open question in this country.

That the State may authorise cities to tax all taxable property legitimately within the cit*ie*'s limits nev-r has been and is not now questioned. The right of the State and county to tax this bridge is freely conceded in this case. This much conceded, it follows that the legislature may authorise the city to tax it if it be legitimately within the cit*ie*'s limits. The legislature has fixed the limits of the city at low-water mark on the Indiana shore, and has authorise- her to tax all property in the cit*ie*'s limits subject to taxation by the State. It is insisted, and truly, that acts authorising cities to tax should be strictly construed, and, being thus construed, the cit*ie*'s limits for taxing purposes should be low-water mark on the Ky. side. While acts authorising taxation should be strictly construed, yet, when the right to tax is clear, it should be liberally construed, so as to cause the burdens to fall alike on all within the taxable boundary. In this case the court believes the taxable bound--ry is *eguil* and co-extensive with the statutory boundary. It is earnestly insisted that the act of the legislature, in so far as it may have intended to authorise this taxation, is unconstitutional and void. With equal earnestness it is insisted that the question here involved has been finally settled in the case of The City of Louisville *vs.* The Louisville Bridge Co., 81 Ky.

76 In that case the court did not pretend to decide that it was *p-r se* unconstitutional for the legislature to authorise cities to tax bridges crossing the Ohio river. All that the court did decide in that case that is binding on this or any other court was that in that case the legislature did not intend to embrace the bridge as subject to city taxation. Several cases are relied on where the court of appeals have relieved parties from the payment of taxes on agricultural lands when the city limits had been extended without the owner's consent. The rule, if one has been established by those cases, should not be extended to cases where property has been vol-

untarily brought within such boundaries. The party thus bringing in his property should be treated as one who sanctioned the extension of a city so as to include his agricultural lands. All that can be deduced from these cases is that in each extension of a town or city the court will hear the complaints of any tax-payer and grant or not grant him relief, as the merits of his particular case may demand. In this case the def'ts voluntarily placed their property within the legally established limits of the city, and should pay the taxes assessed on other property holders of the city after 1885."

At a subsequent day of said July term, 1888, to wit, Friday, July 20th, 1888, the following order was entered herein:

Order.

"The defendant moved the court to set aside the judgment and grant it a new trial herein. Said motion was set for trial on the 20th day of the present term."

77 At a subsequent day of said July term, 1888, to wit, Tuesday, July 24th, 1888, the following order was entered herein:

Order.

"The defendants tendered the affidavit of M. Yeaman, and moved the court to file the same in support of its motion for a new trial. Said motion was for the time continued."

The affidavit referred to as tendered in the above order is here copied as follows:

Affidavit of M. Yeaman.

"The affiant, Malcolm Yeaman, says that he is one of the attorneys for the defendants in this action; that he verily believes that the judge of this court who tried this case and rendered the judgment herein did not commence the trial of this case free from an opinion as to the merits of the controversy, which opinion was formed before the case was called for trial, and that the defendants herein did not have a fair and impartial trial of this case. Affiant files herewith and makes a part hereof a printed paper headed 'City *vs.* Bridge Co.,' which article was printed and published on Saturday, the 14th day of July, 1888, in the Daily Gleaner, a newspaper published in the city of Henderson, which was the Saturday preceding the Monday for which this case had been set for trial, and on which day the case was called and the trial begun; and affiant verily believes that the judge of this court wrote and prepared said article and caused it to be printed and published.

MALCOLM YEAMAN.

Sworn to before me by Malcolm Yeaman this 23rd July, 1888.

S. A. YOUNG, *Cl'k.*"

78 The printed paper referred to in the foregoing affidavit is here copied as follows:

Printed Article.

"CITY
vs.
BRIDGE COMPANY.

Next Monday there will be tried in the circuit court a case of vastly more importance to the city than any case that ever has been or perhaps ever will be tried. The suit involves the right of the city to tax the bridge from low-water mark on the Kentucky side to low-water mark on the Indiana shore. The decision of this question either way will be of great consequence. If the demand of the city is sustained from $5,000 to $20,000 will each year be added to the revenue of the city. This would soon place the city's finances in good shape, while it would be a heavy drain on the income of the bridge company. If not sustained the city will have to move along in the same old gro-ve in which she has been wont to move for the past quarter of a century.

What is remarkable is that so important a question should be found in so uncertain a condition. Some years ago a question similar in many respects arose between the city of Louisville and the railroad bridge spanning the river at that point. The decision in that case was adverse to the city, but it is claimed that nothing in that case prevents the same court from deciding in favor of Henderson. In that case the power of the State to tax the bridge was fully conceded, as it is in this case. It is claimed that the right of the city of Louisville was denied mainly upon the grounds that the act under which the city proceeded did not authorize the levy of the tax sought to be collected; that, at least, is said to be the grounds on which Judge Pryor based his assent to the decision.

79 Judge Lewis dissented from the opinion of the court in that case. Since that decision was rendered Judge Hagin and Judge Hines have vacated their seats in favor of Judges Holt and Bennett.

With Judge Lewis unqualifiedly in favor of the city in that case and Judge Pryor basing his opinion on the peculiar wording of the act in that case, and with Holt and Bennett uncommitted, the question must of necessity be an open one.

The only importance that can be attached to the decision of the circuit court as authority in the case consists in the fact that if the court of appeals should be evenly divided, as is often the case, the decision of the circuit court stands unreversed. The city is represented by Messrs. Dorsey, Merritt and Brown and the bridge company by Yeaman & Lockett and perhaps others. A close and interesting discussion of the case will be had on Monday, when the decision of the circuit court will be awaited with interest."

At a subsequent day of said July term, 1888, to wit, Wednesday, July 25th, 1888, the following order was entered herein:

Order.

"The plaintiff tendered and moved to file the affidavit of C. C. Givens. Said motion was, by the court of its own motion, overruled. The defendant's motion to file the affidavit of M. Yeaman, heretofore entered, being considered by the court, was overruled; to which the defendant objected and excepted.

The defendant's motion for a new trial, being considered by the court, was overruled; to which the defendant objected and
80 excepted, and prayed an appeal to the court of appeals, which was granted."

The affidavit of C. C. Givens, mentioned in the foregoing order, is here copied as follows:

Affidavit C. C. Givens.

"The affiant, C. C. Givens, says that he is one of the editors and proprietors of the Henderson Daily Gleaner. He says that on Saturday evening, of the 14th inst., the day on which was published in said paper the printed article attached to the affidavit filed by Malcolm Yeaman, Esq., the said Yeaman, who is a member of the firm of Yeaman & Lockett, att'ys for the def't in the above-styled case, called on him, the affiant, to know who was the author of the said article, and affiant at once told him that it was written by M. C. Givens, the judge of this court. Affiant says that when he gave this information to Mr. Yeaman the trial of the case had not commenced in court.

C. C. GIVENS.

Sworn to before me by C. C. Givens July 24, '88.
JOHN YOUNG BROWN, *N. P., H. C.*"

At the same day of said July term, 1888, to wit, Wednesday, July 25th, 1888, the following order was entered herein:

Order.

"The plaintiff and the defendants tendered their separate bills of exceptions; which, being signed by the court, were ordered to be filed and made a part of the record in this case."

81 Defendants' bill of exceptions referred to in the above order is now copied as follows:

Def'ts' Bill of Exc.

"And be it further remembered that on the trial of the motion for a new trial herein the defendants tendered and offered to file the affidavit of Malcolm Yeaman and the printed paper headed City *vs.* Bridge Co., which affidavit and printed paper are *are* as follows:

Affidavit M. Yeaman.

"The affiant, Malcolm Yeaman, says that he is one of the attorneys for the defendants in this action; that he verily believes that the judge of this court who tried this case and rendered the judgment herein did not commence the trial of this case free from an opinion as to the merits of the controversy, which opinion was formed before the case was called for trial, and that the defendant herein did not have a fair and impartial trial of this case.

Affiant files herewith and makes a part hereof a printed paper headed 'City *vs.* Bridge Co.,' which article was printed and published on Saturday, the 14th day of July, in the Daily Gleaner, a newspaper published in the city of Henderson, which was the Saturday preceding the Monday for which this case had been set for trial, and on which day the case was called and the trial begun, and affiant verily believes that the judge of this court wrote and prepared said article and caused it to be so printed and published.

MALCOLM YEAMAN.

Sworn to before me by Malcolm Yeaman this 23rd July, 1888.

S. A. YOUNG, *Cl'k.*"

Printed Article.

"CITY
vs.
BRIDGE COMPANY.

Next Monday there will be tried in the circuit court a case of vastly more importance to the city than any case that has
82 ever been, or perhaps ever will be, tried. The suit involves the right of the city to tax the bridge from low-water mark on the Kentucky side to low-water mark on the Indiana shore. The decision of this question either way will be of great consequence. If the demand of the city is sustained, from $5,000 to $20,000 will each year be added to the revenues of the city. This would soon place the city's finances in good shape, while it would be a heavy drain on the income of the bridge company. If not sustained, the city will have to move along in the same old gro-ve in which she has been wont to move for the past quarter of a century.

What is remarkable is that so important a question should be found in so uncertain a condition. Some years ago a question similar in many respects arose between the city of Louisville and the railroad bridge spanning the river at that point. The decision in that case was adverse to the city, but it is claimed that nothing in that case prevents the same court from deciding in favor of Henderson. In that case the power of the State to tax the bridge was fully conceded, as it is in this case. It is claimed that the right of the city of Louisville was denied mainly upon the grounds that the act under which the city proceeded did not authorize the levy of the tax sought to be collected. That, at least, is said to be the

grounds on which Judge Pryor based his assent to the decision. Judge Lewis dissented from the opinion of the court in that case. Since that decision was rendered Judge Hagin and Judge Hines have vacated their seats in favor of Judges Holt and Bennett.

83 With Judge Lewis unqualifiedly in favor of the city in that case and Judge Pryor basing his opinion on the peculiar wording of the act in that case, and with Holt and Bennett uncommitted, the question must of necessity be an open one.

The only importance that can be attached to the decision of the circuit court as authority in the case consists in the fact that if the court of appeals should be evenly divided, as is often the case, the decision of the circuit court stands unreversed. The city is represented by Messrs. Dorsey, Merritt and Brown, and the bridge company by Yeaman & Lockett and perhaps others. A close and interesting discussion of the case will be had on Monday, when the decision of the circuit court will be awaited with interest."

But the plaintiff objected to the filing of said affidavit and printed paper; which objection was sustained; to which ruling of the court the defendant objected and excepted. The plaintiff then tendered and offered to file the affidavit of C. C. Givens; which affidavit is as follows:

Affidavit C. C. Givens.

"The affiant, C. C. Givens, says that he is one of the editors and proprietors of the Henderson Daily Gleaner. He says that on Saturday evening of the 14th inst., the day on which was published in said paper the printed article attached to the affidavit filed by Malcolm Yeaman, Esq., the said Yeaman, who is a member of the firm of Yeaman & Lockett, att'ys for the def't in the above-styled case, called on him, the affiant, to know who was the author of the said article, and affiant at once told him that it was written by M. C. Givens, the judge of this court. Affiant says that when he

84 gave this information to Mr. Yeaman the trial of the case had not commenced in court.

C. C. GIVENS.

Sworn to before me by C. C. Givens July 24, '88.
JOHN YOUNG BROWN, *N. P., H. C.*"

"But the court of its own motion refused to allow said affidavit to be filed; to which ruling the plaintiff objected and excepted. The court then overruled the motion for a new trial; to which ruling of the court the defendants objected and excepted and prayed an appeal, which is granted, and this bill of exceptions is ordered to be made a part of the record in this case.

M. C. GIVENS, *Judge.*"

The plaintiff's bill of exceptions referred to in the foregoing order is here copied as follows:

Pl'ff's Bill of Exc'ps.

"Be it remembered that upon the trial of this cause it was agreed that the assessors for the city of Henderson assessed the Henderson bridge for taxation for the year 1885 and listed the same upon the assessors' book as follows, viz: One bridge, unfinished, valued at $600,000.00, and for the years 1886 & 1887 it was listed as one bridge structure and its approach, consisting of masonry piers and the iron structure thereon, and is on the line of 4th street, extending to low-water mark on the Indiana shore of the Ohio river, valued each year at $1,000,000.00.

M. C. GIVENS, *Judge.*"

85 The depositions for the defendant, filed in the clerk's office of the Henderson circuit court on July 2nd, 1888, are here copied as follows:

Def't's Deposition-.

"It is agreed that the defendant, The Henderson Bridge Company, may take the depositions of witnesses in Louisville, Ky., and that only the following interrogatories and cross-interrogatories shall be propounded to said witnesses, viz:

BROWN & WARD,
MONTGOMERY MERRITT,
J. L. DORSEY,
Att'ys for Plaintiff.
YEAMAN & LOCKETT,
Att'ys for Defendant.

Dep. Eastwood.

The deposition of S. S. Eastwood, taken on the 25th day of June, 1888, at the office of ass't chief att'y Louisville & Nashville Railroad Company, Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the defendant in an action between The City of Henderson, plaintiff, and The Henderson Bridge Company, defendant, now pending in the Henderson circuit court, neither party, by attorney or ag't, being present.

S. S. EASTWOOD, being duly sworn, in answer to the attached interrogatories and cross-interrogatories deposed as follows:

1st. What is your name, age, and residence, and what official or other connection have you with the Henderson Bridge Company or the Louisville & Nashville Railroad Co.?

Answer to interrogatory 1st. My name is S. S. Eastwood; age, forty-five; residence, Louisville, Kentucky; I am secretary and treasurer of the Henderson Bridge Company; have been since Oc-
86 tober 31st, 1881, continuously until this date. I have no official connection with the Louisville & Nashville Railroad Company.

2nd. State (1) the length of the Henderson bridge or bridge approach from the beginning of the approach of said bridge at or near the west or northwest line of Main street, in the city of Henderson, to the beginning of the main structure or bridge proper on the Kentucky shore; (2) the length of said bridge from the beginning of the main structure or bridge proper on the Kentucky shore to low-water mark on the Indiana shore, and (3) the length of the bridge from low-water mark on the Indiana shore to the terminus of the bridge in Indiana.

Answer to interrogatory 2nd. (1) it is $503\frac{7}{10}$ feet; (2) 1,968 feet; (3) 1,227 feet.

3rd. State, if you can, the cost of that part of the bridge described in the 1st and 2nd divisions of the last question, and state also the value of each of said parts at this time and on the 10th Jan'y, 1886, and 10th Jan'y, 1887, stating the cost and value of each of said parts separately.

Answer to interrogatory 3rd. The cost of that part of the bridge described in the 1st section of the preceding question is $10,229.72; cost of that part of the bridge described in the 2nd section of the preceding question, $639,505.82. That was the cost at contract prices, say, on the 1st of November, 1885, and the same cost would apply to the 10th of January, '86, and the 10th of January, '87, less a reasonable reduction for depreciation for wear and tear, rust, &c.

4th. When was the construction of said bridge commenced, when was the bridge completed, and when was it opened for busi-
87 ness?

Answer to interrogatory 4th. Active construction of the bridge by contractors for masonery and foundation work in the month of May, 1882. The first passenger train passed over the bridge July 13th, 1885, and trains for passenger and freight traffic then commenced to pass continuously over said bridge. The construction was completed by the contractors in November, 1885.

5th. What progress had been made in the construction up to the 10th of Jan'y, 1885, and what was the condition as to completeness at that time of those parts of the bridge described in the 1st and 2nd divisions of question No. 2, stating each part separately, and state also, if you can, what each of said parts of the bridge had cost up to that date and what was then the reasonable value of each of said parts.

Answer to interrogatory 5th. On the 10th of January, 1885, the bridge was in no way a completed structure. I cannot state as to the cost or the reasonable value of the parts called for at that date.

6th. State whether the said bridge company had any notice or knowledge before the bringing of this suit of said bridge property having been assessed by the city of Henderson for taxation for the years 1885, 1886, or 1887, or either of said years; and, if so, how said knowledge was acquired.

Answer to interrogatory 6th. The only official notice or knowledge that the Henderson Bridge Company had of its property having been assessed by the city of Henderson for taxation for
88 the years 1885, 1886, 1887, or either of said years, before the

beginning of this suit, was the receiving of a letter dated October 22nd, 1886, signed by P. R. Yancey, said to be the city tax collector, wherein he wrote to the president of this company that the taxes were due to the city of Henderson for the year 1886, and also the receiving of a letter by the president of the company, dated December 1st, 1887, wherein it was stated that the taxes were due the city of Henderson for the years 1885, 1886, and 1887.

7th. What is the capital stock of the Henderson Bridge Company and what amount or porportion of that stock is held by the Louisville & Nashville R. R. Co.?

Answer to interrogatory 7th. The authorized capital stock is one million, divided into ten thousand shares of one hundred dollars each. There is standing to the credit of the Louisville and Nashville Railroad Company upon the stock books of this company four thousand nine hundred and ninety-six shares of one hundred dollars each, making a total of four hundred and ninety-nine thousand six hundred dollars.

8th. Describe the Henderson bridge and the territory lying under and on both sides of it. How is the bridge constructed and of what material, and upon what does it rest? For what purpose was the bridge and for what purpose can it be used? Describe the ground under and on each side of the approach from Main street, in the city of Henderson, to the Kentucky shore of the Ohio river. What is under and on both sides of the bridge from the Kentucky to the Indiana shore, and whether said territory can be used for any purpose; and, if so, for what purpose? Is there any town or
89 settlement at the northern or Indiana terminus of said bridge? What is the character of the land under and on both sides of the bridge from low-water mark on the Indiana — to the northern terminus of the bridge? Does said land overflow; if so, at what periods and to what depth and for what distance above and below the bridge, and for how far back from low-water mark on the Indiana shore?

Answer to interrogatory 8th. The Henderson bridge is mainly constructed over the waters of the Ohio river. It is constructed upon piers of stone with on iron superstructure. The bridge is used entirely as a railroad bridge, connecting the system of railways on the south and north sides of the Ohio river. Water is under and on both sides of the bridge from the Kentucky to the Indiana shore. The territory can only be used for the purposes of water navigation. There is no town situated on the northern or Indiana terminus, the land there being a long stretch of low country suitable for agricultural purposes. The land is always subject to overflow during the frequent rises that annually take place in the Ohio river. These risings are of varying depths; sometimes they are excessive, extending for a great distance both above and below the bridge and for a great distance back on the Indiana shore.

9. How is said bridge lighted at night, if at all, and how and by whom is it policed or patrolled?

Answer to interrogatory 9th. The bridge is not lighted at night except at channel piers as a warning for purposes of navigating the

river by steamboats and other craft. It is policed or patrolled by employés of the Louisville & Nashville Railroad Company.

90 Cross-examined by attorneys for plaintiff:

1. State the value and costs of the bridge from low-water mark on the Indiana shore of the Ohio river to the end of the bridge.

Answer to cross-interrogatory 1st. Answer to this question has previously been given in answer to interrogatory 3 of the direct examination.

2. State how much the bridge is bonded for and state what the bonds are worth. State amount of bonds issued to build bridge, and state all issued since same was built to be used for bridge purposes.

Answer to interrogatory 2nd. The authorized bonded debt is two million dollars. The bonds are worth in the open market varying prices, according to the temper and drift of speculation. Two millions of bonds were issued to build the bridge, and were all issued during its construction, and were only used for bridge purposes.

3. State what the stock is worth. State the amount of stock owned by the Louisville & Nashville railroad. State the whole amount of the stock.

Answer to cross-interrogatory 3rd. The stock has no fixed value, and is worth varying prices, according to the temper and drift of speculation. The Louisville & Nashville Railroad Company is credited upon the stock books of the Henderson Bridge Company as holding four thousand nine hundred and ninety-six shares of stock, one hundred dollars each, making a total of four hundred and ninety-nine thousand six hundred dollars. The whole
91 amount of the authorized capital stock is one million dollars.

4. State the annual income of the bridge for the year- 1886 & 1887 & for 1888 up to this time.

Answer to cross-interrogatory 4. The guaranteed annual income of the bridge company is one hundred and ninety thousand dollars, out of which sum interest upon the bonds, contributions for the sinking fund, etc., are to be paid.

5. State your connection with the bridge and your opportunities for knowing the answers you have made.

Answer to cross-interrogatory 5th. I have been secretary and treasurer of the Henderson Bridge Company since October 31st, 1881, and answers to the question are made upon my daily knowledge of its affairs.

S. S. EASTWOOD.

Dep. Bradford.

Also deposition of C. O. BRADFORD, taken at the same time and place and in the same manner. He being first duly sworn by me, in answer to the same interrogatories and cross-interrogatories testified as follows:

1st. What is your name, age, and residence, and what official or

other connection have you with the Henderson Bridge Co. or the Louisville & Nashville Railroad Co.?

Answer to interrogatory 1st. Age, thirty-four; residence, New Albany, Indiana. I have no present connection with the Henderson Bridge Company. I am assistant to chief engineer of construction of the Louisville & Nashville Railroad Company.

2nd. State (1) the length of the Henderson bridge or bridge
92 approach from the beginning of the approach of said bridge at or near the west or northwest line of Main street, in the city of Henderson, to the beginning of the main structure or bridge proper on the Kentucky shore; (2) the length of said bridge from the beginning of the main structure or bridge proper on the Kentucky shore to low-water mark on the Indiana shore, and (3) the length of the bridge from low-water mark on the Indiana shore to the terminus of the bridge in Indiana.

Answer to interrogatory 2nd. (1) It is 503.7 feet; (2) 1,968 feet; (3) 1,227 feet.

3rd. State, if you can, the cost of that part of the bridge described in the 1st and 2nd divisions of the last question, and state also the value of each of said parts at this time and on the 10th Jan'y, 1886, and 10th Jan'y, 1887, stating the cost and value of each of said parts separately.

Answer to interrogatory 3rd. The cost of that part of the bridge described in the first section of the preceding question is $10,229.72; cost of that part of the bridge described in the second section of the preceding question, $639,505.82. The figures were about their value on the 10th of January, 1886. The present worth would be the same less the depreciation.

4th. When was the construction of said bridge commenced, when was the bridge completed, and when was it opened for business?

Answer to interrogatory 4th. The first estimate to the contractors was given in May, 1882. The bridge was opened for the passage of trains on the 13th of July, 1885, but the
93 bridge was not completed by contractors until November, 1885.

5th. What progress had been made in the construction up to the 10th Jan'y, 1885, and what was the condition as to completeness at that time of those parts of the bridge described in the 1st and 2nd divisions of question No. 2, stating each part separately? And state also, if you can, what each of said parts of the bridge had cost up to that date and what was then the reasonable value of each of said parts.

Answer to interrogatory 5th. Piers numbers 1, 2, 3, 4, 5, and 6 were completed, and span 2–3, span 3–4, and span 4–5 were completed. The part described in the first division of question number 2, virtually nothing done, only two thousand dollars having been expended up to that time on that part; that part covered by the second division of the second question was all in an unfinished condition as regards a completed bridge; had been expended on pier number 1 about two thousand dollars; pier number 2, seventy-six hundred dollars; pier number 3, forty-three thousand three hundred and

thirty dollars; on piers 4, 5, and 6, two hundred and five thousand four hundred and sixty-three dollars; pier number 7, thirty-eight thousand dollars, and pier number 8, thirty-nine thousand six hundred dollars. There had been also expended in the erection of the iron-work of the span between piers 2 and 3 sixty-six hundred and fifty-six dollars; span between piers three and four, twenty-seven thousand seventy-one dollars; span between piers 4 and 5, twenty-seven thousand seventy-one dollars, making a total expenditure of three hundred and ninety-four thousand seven hundred and
94 ninety-one dollars. These parts had no value at all, as they had no complete connection with the bridge and could not be used as a bridge, being only disjointed parts of the whole structure.

6th. State whether the said bridge company had any notice or knowledge before the bringing of this suit of said bridge property having been assessed by the city of Henderson for taxation for the years 1885, 1886, or 1887 or either of said years; and, if so, how said knowledge was acquired.

Answer to interrogatory 6th. I have no knowledge.

7th. What is the capital stock of the Henderson Bridge Company, and what amount or proportion of that stock is held by *by* the Louisville & Nashville R. R. Co.?

Answer to interrogatory 7. I have no knowledge about what the capital stock was.

8th. Describe the Henderson bridge and the territory lying under and on both sides of it. How is the bridge constructed, and of what material, and upon what does it rest? For what purpose was the bridge, and for what purpose can it be used? Describe the ground under and on each side of the approach from Main street, in the city of Henderson, to the Kentucky shore of the Ohio river. What is under and on both sides of the bridge from the Kentucky to the Indiana shore, and whether said territory can be used for any purpose; and, if so, for what purpose? Is there any town or settlement at the northern or Indiana terminus of said bridge? What is the character of the land under and on both sides of the bridge from low-water mark on the Indiana to the northern terminus of
95 the bridge? Does said land overflow; if so, at what periods and to what depth, and for what distance above and below the bridge and for how far back from low-water mark on the Indiana shore?

Answer to interrogatory 8th. The bridge is composed of an approach trestle, called the Kentucky approach trestle, and the bridge proper, the Kentucky approach composed of iron bents on stone pedestals, the bridge proper composed of fifteen spans of iron and steel-work resting on sixteen piers of masonry, nine or which were completely surrounded by water at ordinary low stage of water, these nine having pneumatic foundations; four spans were on the river bank—Indiana side—surrounded by water at every ordinary high water. The banks on the Kentucky side, beginning at pier one, are rather abrupt, and in their present condition could not be used in traveling up and down them with vehicles; the bank on the Indiana

side very abrupt and steep. Neither bank of the river could be used for any commercial purposes without a great outlay of money and material. This bridge was constructed soleln for railroad purposes and could not be used for any other purposes. Water is under both sides of the bridge from the Kentucky to the Indiana shore, and said territory could only be used for purposes of navigation. There is no town on the northern terminus or Indiana side of the bridge, nor do I think there ever will be, for the reason that for miles above and below the bridge and for several miles north of the bridge the land is very low and is completely covered at ordinary high water with water, and at extreme high water has from twenty to twenty-
96 five feet of water on it in many places. This land is subject to overflow at all periods of high or extremely high waters for miles up and down the river and for several miles back.

9. How is said bridge lighted at night, if at all, and how and by whom is it policed or patrolled?

Answer to interrogatory 9th. Said bridge is lighted only as required by the Government, which, I believe, compels all bridge companies to place three lights at the channel spans of all bridges. It is policed by servants under the pay of the Louisville & Nashville Railroad Company.

Cross-examined by attorneys for plaintiff:

1. State the value and costs of the bridge from low-water mark on the Indiana shore of the Ohio river to the end of the bridge.

Answer to cross-interrogatory 1st. The answer to this interrogatory will be found in my answer to interrogatory No. 3 in the direct examination.

2. State how much the bridge is bonded for and state what the bonds are worth. State amount of bonds issued to build bridge, and state all issued since same was built to be used for bridge purposes.

Answer to cross-interrogatory 2nd. I do not know.

3. State what the stock is worth; state the amount of stock owned by the Louisville & Nashville railroad; state the whole amount of the stock.

Answer to cross-interrogatory 3rd. I do not know what the stock is worth.

4. State the annual income of the bridge for the year- 1886
97 & 1887 and for 1888 up to this time.

Answer to cross-interrogatory 4th. I have no knowledge of the annual income of the bridge.

5. State your connection with the bridge and your opportunities for knowing the answers you have made.

Answer to cross-interrogatory 5th. I was connected with the Henderson Bridge Company as assistant engineer from the 20th of September, 1883, until February, 1886. Almost the whole of that time was spent on that ground at the bridge site during its construction. My opportunities for knowing the answers that have been made were by personal and daily observations which I made during my connection with said bridge.

C. O. BRADFORD.

STATE OF KENTUCKY, }
County of Jefferson. }

Certificate S. P. Hathaway, N. P., J. Co.

I, S. P. Hathaway, notary public for and in the said county of Jefferson, State of Kentucky, certify that the foregoing depositions of S. S. Eastwood and C. O. Bradford were taken upon interrogatories, pursuant to agreement attached, before me at the time and place and in the manner mentioned in the caption; that the said witnesses were first duly sworn by me that the testimony they should give in the action should be the truth, the whole truth, and nothing but the truth; that said depositions were written by me in the presence of said witnesses and subscribed to by said witnesses in my presence, neither party, by agent or attorney, being present during the taking of the same.

Witness my hand and seal this 30th day of June, 1888.

98 [Seal Susan P. Hathaway, Notary Public, Jefferson Co., Ky.]

S. P. HATHAWAY,
N. P., J. Co., Ky.

On the 3rd day of August, 1888, the plaintiffs filed their supersedeas bond (herein) in the clerk's office of the Henderson circuit court.

Said bond is here copied as follows:

Supersedeas Bond.

"HENDERSON BRIDGE COMPANY & The Louisville & Nashville Railroad Co., Appellants,
against
THE CITY OF HENDERSON, Appellee. } Upon an Appeal from a Judgment of the Henderson Circuit Court, Rendered 18th Day of July, 1888.

Whereas said appellants, The Henderson Bridge Co. and The Louisville & Nashville Railroad Co., having prayed an appeal from the judgment of the Henderson circuit court, rendered at its July term, 1888, against appellants in favor of the appellee, adjudging the bridge structure, masonry, piers, and approach of the Henderson Bridge Co. subject to taxation and adjudging the city of Henderson a lien on said bridge, piers, and approach to low-water mark on the Indiana side of the Ohio river for the sum of $17,384.00 tax for the year 1886, and $15,810.00 for the year 1887, with interest from July 18th, 1888, and costs, and ruling the Henderson Bridge Company to pay same, and the appellants desireing to supersede the said judgment above mentioned:

Now, we, John A. Carter and Jno. D. Taggart, sureties, do hereby covenant to and with the appellee, The City of Henderson, that the appellants will pay to the appellee all costs and damages
99 that may be adjudged against the appellant- on the appeal, and also that they will satisfy and perform the judgment above stated, in case it shall be affirmed, and any judgment or order

which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid.

Witness our hands this third day of August, 1888.

HENDERSON BRIDGE CO.,
By YEAMAN & LOCKETT, *Att'ys.*
LOUISVILLE & NASHVILLE RAILROAD CO.,
By YEAMAN & LOCKETT, *Att'ys.*
JOHN A. CARTER,
By MALCOLM YEAMAN,
Attorney-in-Fact.
JOHN D. TAGGART,
By MALCOLM YEAMAN,
Attorney-in-Fact.

Attest: S. A. YOUNG, *Clk*,
By J. H. HART, *D. C.*

'88, Aug. 3rd, filed.

S. A. YOUNG, *Clk*,
By J. H. HART, *D. C.*"

The power of attorney filed with and attached to said bond is here copied as follows:

Power of Attorney.

"Whereas in the action lately pending in the Henderson circuit court of The City of Henderson *vs.* The Henderson Bridge Company, &c., a judgment was rendered by said court at its July term, 1888, in favor of said city, deciding, among other things, that the plaintiff therein had a lien upon the bridge structure and masonry and piers and approach thereto of the defendant The Henderson Bridge Company, extending to low-water mark on the Indiana side of the Ohio river, for the sum of $17,384.00 for the year 1886, and for the further sum of $15,810.00 for the year 1887, with interest from the date of said judgment, and plaintiff's costs therein expended, and ruled the defendant The Henderson Bridge
100 Company to pay said sum and costs to the plaintiff on or before the 1st day of the October term, 1888, of said court; and

Whereas the defendants, The Henderson Bridge Company and The Louisville & Nashville Railroad Company, have prayed an appeal from said judgment to the court of appeals of Kentucky, we, John A. Carter and John D. Taggart, of the city of Louisville and State of Kentucky, do each of us hereby authorize and empower Malcolm Yeaman, Esq., of the county of Henderson and State of Kentucky, as our attorney-in-fact to execute and sign our respective names to the necessary appeal and supersedeas bond in behalf of said appellants for the purpose of superseding said judgment pending said appeal.

Witness our hands this 20th day of July, 1888.

JOHN A. CARTER.
JOHN D. TAGGART.

Witness:
A. M. QUARRIER.

STATE OF KENTUCKY, *Jefferson County,* } ss:

We, John A. Carter and John D. Taggart, hereby make oath that we are worth in property situated in this State subject to execution over and above our debts an amount largely greater than the sums named in the foregoing power of attorney.

JOHN A. CARTER.
JOHN D. TAGGART.

Subscribed and sworn to before me by John A. Carter and John D. Taggart this 28th day of July, 1888.

101 [Seal William Maguire, Notary Public, Jefferson County, Ky.]

WM. MAGUIRE,
Notary Public, Jefferson County, Kentucky."

Upon filing of said supersedeas bond supersedeas and copy issued thereon. Said supersedeas is here copied as follows:

Supersedeas.

"Henderson Circuit Court.

HENDERSON BRIDGE COMPANY & THE LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
vs.
THE CITY OF HENDERSON, Appellee. } Supersedeas.

I do certify that an appeal has been granted by this court from a judgment obtained by The City of Henderson against The Henderson Bridge Co. adjudging the bridge structure, &c., of the Henderson Bridge Co. subject to tacation adjoining the city, a lien for $17,384 tax for 1886 and for $15,810 tax for 1887, and ruling the bridge company to pay same, with interest at 6 per cent. from July 18th, 1888, in the Henderson circuit court at its July term, 1888, and that a supersedeas bond has been executed.

Therefore the appellees and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as clerk of said court this 3 day of August, 1888.

S. A. YOUNG, *C. H. C. C.*,
By J. H. HART, *D. C.*"

102 Said supersedeas bears the following official endorsement:

Off. Return.

"Executed on the city of Henderson by delivering a true copy of this writ to Phelps Sasseen, mayor thereof.

Aug. 3d, 1888.

J. E. HICKMAN, *S., H. C.,*
By H. W. KOHL, *D. S.*"

STATE OF KENTUCKY:

Henderson Circuit Court.

I, S. A. Young, clerk of the Henderson circuit court, same being a court of record in and for the county and State aforesaid, do certify that the foregoing one hundred and one pages (from one (1) to one hundred and one (101), inclusive) contains a true and complete transcript of all the records and proceedings, as well as the plat, or original Exhibit "H. B.," attached hereto, on page 56 of this Transcript, in the suit of The City of Henderson, plaintiff, against The Henderson Bridge Company, defendant, as directed to be copied per defendant's schedule, which is incorporated and made a part of this transcript.

Given under my hand as clerk of said court this 20th day of August, 1888.

S. A. YOUNG, *C. H. C. C.*

Upon the filing of the foregoing transcript the appellant made and filed the following statement:

Court of Appeals.

103 THE HENDERSON BRIDGE CO., Appellant,
vs.
CITY OF HENDERSON, Appellee.

The judgment appealed from was rendered at the July term, 1888, of the Henderson circuit court, to wit, on the 18th July, 1888, and is copied at pages 85 & 86 of this Transcript. An appeal*ed* was prayed and granted by the court below.

YEAMAN & LOCKETT,
Att'ys for Appellant, Hend. Br. Co.

104 Afterwards, at a term of the court of appeals of Kentucky, held in and for the Commonwealth of Kentucky on the 5th day of March, 1889, the following order was made:

THE HENDERSON BRIDGE CO.
vs.
THE CITY OF HENDERSON.

HENDERSON.

Ordered that this cause be continued for oral argument.

Afterwards, on the 10th day of September, 1889, the following order was made herein:

By agreement of parties it is ordered that this cause be passed to November 11th for argument.

Afterwards, on the 12th day of November, 1889, the following order was made herein:

Submission.

This cause was argued by John L. Dorsey for appellee, John W. Lockett and William Lindsy for appellant, and submitted.

Afterwards, on the 21st day of June, 1890, the following order and judgments were entered herein:

1st Judg't.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages on the amount of the judgment superseded herein, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost expended herein.

Filing Petitions for Reh'g.

Afterwards, on the 12th day of July, 1890, the appellant filed in the clerk's office of said court a petition for a rehearing herein, and on the 17th day of July, 1890, the appellee filed in said office its petition for a rehearing.

Afterwards, on the first daoy of September, 1890, at a term of said court held as aforesaid on said day, the following orders
105 were made herein:

The appellant, by counsel, filed a petition and moved the court for a rehearing herein. The appellee, by counsel, also filed a petition and moved the court for a rehearing herein, and the cause is submitted on said motion.

The following is a copy of the appellant's petition filed in the clerk's office on the 12th day of July, 1890, and noted of record and filed by the foregoing order:

Petition of App'l't for Reh'g.

We respectfully submit that it is impossible for the court to adhere to its opinion in this case for the following reasons:

First.

It clearly appears from the record that an important question duly submitted by counsel and decisive of about one-half the claim in controversy, has been overlooked by the court. Rule 19, of March 15, '84.

That question is: Can the property of appellant bridge Co. be subjected to taxation by appellee for municipal purposes—that is,

for municipal purposes as distinguished from what the court denominates "taxing district" purposes?

About seventeen thousand dollars of the amount for which the judgment of the court below was rendered is, as shown by the record, for municipal purposes.

The court affirms that judgment, and says, in its opinion, "The appellee caused all that part of appellant's bridge situated on the Ohio river south of low-water mark on the Indiana shore to be taxed for the purpose of paying the railroad and school taxes
106 that the appellee was authorized to impose and collect on real estate within her limits." And again, "It is well settled that the appellee's jurisdiction extends to the low-water mark on the Indiana shore, but she cannot tax property such as the appellant's, situated on said river, for city or municipal purposes for the reason already indicated." And again, "We do not mean to decide that this agreement embraces the right to tax for city or municipal purposes, because that question is not before us for decision." Yet, if the court will bear with us, we will show that to be one of the chief questions that the records and briefs of counsel on both sides brought before the court for its decision.

The petition (which is copied into the Transcript, p. 2–16) alleges as follows:

1st. Plaintiff further states that "by an act of the said General Assembly entitled 'An act to amend,' &c., the charter of the city of Henderson, said city was authorized and empowered to annually levy and collect taxes to defray the expenses of the city government at the rate of not exceeding 60 cents on each $100 worth of property," &c.

2nd. "The plaintiff caused said bridge to be assessed by the city assessor for taxation to low-water mark on the Indiana side of the Ohio river, like other property of said city, for the year 1885, and as provided in the acts aforesaid, at a valuation of $60,000, and for the years 1886 and 1887 at a valuation each year of $1,000,000, to pay the interest on the bonded indebtedness aforesaid and to defray the ordinary expenses of the city government. The tax for the year 1885 amounted to $1,020 to pay interest on bonds issued for city purposes and to $3,180 to defray the expenses of the government of the city."

107 3rd. "The tax on that portion of the bridge within the city limits for the year 1886 amounted to $1,500 to pay interest on bonds issued for city purposes, and to $5,200 to defray the annual expenses of the city government.

4th. The tax on that portion of the bridge within the limits of the city for the year 1887 amounted to $1,500 to pay the interest on bonds issued to city purposes, and to $5,000 to defray the annual expenses of the government of the city."

5th. The petition then recites the passage of the ordinances levying the tax for the three years, and sets forth specifically, item by item, the purpose for which each tax is levied.

As an example we will take the last year, 1887. It is as follows:

An ad valorem tax of 50 cents on the $100 worth of property to pay the annual expenses of the city government.

An ad valorem tax of 16 cents on the $100 to defray the annual expenses of the aforesaid public schools.

An ad valorem tax of 52 cents on the $100 to pay the interest on the railroad bonds.

An ad valorem tax of 2 cents on the $100 to pay the interest on the school bonds.

An ad valorem tax of 20 cents on the $100 to pay the interest on the water-works bonds.

An ad valorem tax of 15 cents to pay the interest on the bonds issued for city purposes.

6th. The ordinances levying the tax for each of the years are also copied into the transcript. They are all alike, except dates and amounts, and each one sets out specifically the different purposes for which the tax is levied. These ordinances are divided into sections. Each purpose for which a tax is levied is given a sepa-
108 rate section. The first section of each ordinance provides that said tax shall be "devoted to and used exclusively for the purpose of defraying the current and ordinary expenses of the city of Henderson for the current fiscal year."

7th. The judgment appealed from recites that "as to the years 1886 and 1887 the court adjudges that the bridge and the approach thereto were subject to taxation for all the purposes and for the amounts claimed in the petition," and then renders judgment for the whole amount claimed for the years 1886 and 1887.

8th. The briefs of appellant and appellee both present the fact that *that* the judgment appealed from is made up of taxes levied for municipal purposes and taxes levied for "taxing district" purposes. The opening sentence of appellee's brief is a quotation from appellant's brief in these words: "There is no issue of fact in the case nor any question as to State and county taxation for which the bridge is regularly assessed and the taxes paid without objection; the only question involved is, as matter of law in Kentucky, are bridges spanning the Ohio river subject to taxation for municipal purposes by the city or town from which the structure starts from the Kentucky shore."

It is true the counsel for appellant in so stating the question intended to include railroad and school taxes and taxes for municipal purposes, but counsel for appellee adopts that form of stating the question, and follows the quotation immediately with their own statement that "with the exception that we shall state, relating to taxing districts, such is the question to be decided by the court."

In order that the court may see at a glance just what ques-
109 tion is before the court for decision, we will here copy a summarized statement filed by the city as an exhibit with its petition, and also copied into the Transcript, 24, 26. It shows the purpose for which the several taxes were levied for which the court below rendered judgment, and which judgment this court affirms under the apprehension that no tax for municipal purposes is included. It is as follows:

1886.

City revenue tax	$5,200
Water-works bond tax	1,400
Railroad bond tax	5,600
Public school tax	2,000
School bond tax	700
City funding bond tax	1,500
Penalty	984
Total	$17,384

1887.

City revenue tax	$5,000
Water-works bond tax	2,000
Railroad bond tax	5,200
Public school tax	1,600
School bond tax	200
City funding bond tax	1,500
Penalty	310
Total	$15,810

It appears from the above statement that of the amount embraced in the judgment of the court below and which this court affirms, the following sums are for "city or municipal purposes," viz: For 1886 the sum of $5,200 and for 1887 $5,000—that is, those two sums, amounting to $10,200, are *co nomine* for "city or municipal purposes," or, as the record designates them, they "shall be devoted to and used exclusively for the purpose of defraying the current and ordinary expenses of the city of Henderson for the fiscal year," &c.; but those two sums do not constitute all the city or municipal tax embraced in the judgment. For each of the years there is embraced in the judgment the sum of $1,500 (making $3,000 for the two years) that are for "city funding bond tax." These two sums, as shown by the record, are for the purpose of paying in-
110 terest on bonds issued by the city to fund her floating municipal debt—that is, to take up scrip that had been issued for ordinary current municipal expenses; but, more than that, there is includ*ing* in the judgment of the amount below for tax to pay interest on the water-works bond for the year 1886 the sum of $1,400 and for the year 1887 the sum of $2,000. The court does not intimate in its opinion that the appellant's property is liable for any except the "district" tax. The court say, "The appellee caused all that part of appellant's bridge situated, &c., to be taxed for the purpose of paying the railroad and school taxes." The court then holds that the legislative acts authorizing the railroad and school taxes created "taxing districts;" that the taxes for those purposes are levied by these "taxing districts" and not by the city in its municipal capacity. The court say, "The city may, as a taxing district, assess property within its limits for taxation and collect the taxes thereon; that she would not be authorized to assess

and collect for city or municipal purposes only;" and again, "This court held in the Louisville bridge case that the Louisville bridge received no actual or presumed benefit from the city government proper, and consequently the bridge was not subject to city or municipal taxation;" and again, "but she (the city of Henderson) cannot tax property, such as the appellant's, situated on said river for city or municipal purposes." There is no intimation in the opinion that when the legislature authorized the city to construct water works and to issue bonds and levy a tax for that purpose a water-works taxing district was created, and we take it that the court will not so hold, and that the court did not intend to
111 affirm the judgment, embracing, as it does, $3,400 of water-works tax.

So the matter stands thus. The court has affirmed a judgment embracing the following municipal taxes:

Municipal taxes, *eo nomine*	$10,200
City funding bond tax	3,000
Water-works bond tax	3,400
Total municipal tax embraced in judgment	$16,600

But there is also embraced in the judgment two sums as penalty for non-payment, viz: For 1886, $984, and for 1887, $310; total penalty embraced in the judgment, $1,294. A proportionate part of this penalty—about one-half—attaches to the municipal tax, so that this court affirms the judgment of the court below, embracing, as it does, about $17,000 of city or municipal tax proper, as well as about $16,000 of railroad and school tax.

As we read the opinion, such was evidently not the intention of the court; so that even if the court adheres to its opinion that the appellant is liable for the railroad and school tax, it must reverse the judgment of the court below for the reason that it embraces a very large sum for city or municipal tax, for which the court in its opinion says expressly appellant is not liable.

Second.

The court cites, and without disapprobation, the case of The Louisville Bridge Co. *vs.* City of Louisville, 81 Ky., 189, and in the opinion in the case at bar this court says: "In the Louisville bridge case all that is decided is that in order to authorize the city
112 government to subject real estate situated within its corporate limits to taxation for city or municipal purposes only there must be actual or presumed benefits to such property by the city government being extended over it. Accordingly this court held in the case, *supra*, that the Louisville bridge received no actual or presumed benefit from the city government proper, and consequentiy the bridge was not subject to city or municipal taxation."

We respectfully ask the court to again examine the Louisville bridge case, for it seems to us that it did involve more than the liability of the bridge for city or municipal taxes, and that this court in that case did decide more than that the bridge was not

liable for that character of taxation. There were involved in that case, as in this, not only city taxes proper, but also railroad, school, water-works, and other taxes, and this court held in the Louisville bridge case that the bridge was not liable for any of them.

The following is a statement taken from the transcript in the Louisville bridge case, showing the character of the taxes sought to be collected of the Louisville bridge for one of the three years in question. The statement of the other years does not differ from it. Following is the statement:

Taxes 1874 *on* $750,000.00.

City tax	85c.		
House of refuge	5		
Sewer	8		
Street cleaning	8	On $750,000.00	$9,675 00
Footway	2		
Street repairing	6		
Street reconstruction	15		
School tax on $750,000.00			1,875 00
Institution bonds	2c.		
Improvement bonds	3		
City hall bonds	3		
113 Reconstruction bonds	3	On $750,000.00	3,975 00
Road-bed bonds	2		
Sinking-fund bonds	40		
E. & P. R. R. tax, 1st issue, on $750,000.00			750 00
" " 2d " "			750 00
L., N. A. & St. L. R'y tax on	"		375 00

It will be seen that a school tax of 25 cents on the $100 was levied, and that three separate levies were made for railroad taxes—two for the Elizabethtown and Paducah railroad and one for the Louisville, New Albany and St. Louis air line. There does not appear to be any levy distinctly stating that it was for water purposes, but there is for each year a sinking-fund tax of 40 cents levied. The city of Louisville had out at the time a very large issue of water-works bonds, on which it was paying the interest and providing for the ultimate payment of the principal by means of its sinking fund. The city owned the stock of the water company, and the company's bonded debt is paid by taxation upon the property of the city, so the decision of this court in the Louisville bridge case determined that the bridge property was not liable for taxation for either school, railroad, or water-tax levies. The character of these separate levies did not escape the attention of this court; they are plainly and distinctly set forth, and Judge Lewis, in his dissenting opinion, calls attention to them in saying: "It further appears that of the amount to be levied and collected according to the assessment one-fourth of one per cent. was to be applied to the city schools, which constitute a part of the common-school system of the State."

If this court adheres to its opinion in this case—that the Hen-

derson bridge is liable for the railroad and school tax—then
114 it would be true that the Louisville bridge, a similar but more expensive structure, crossing the same river, in the same State, and used for the same purpose, is exempt by the judgment of this court from a like and very onerous burden that is imposed upon the Henderson bridge; and yet there is no question involved in the case at bar that has not been conclusively determined by the Louisville bridge case. Under the authority of that case the Louisville bridge is exempt from exactly the same character of taxation that is imposed upon the Henderson bridge by the judgment in this case. It seems to us not unreasonable to ask the court to reconcile the judgments in the two cases—to either reverse the judgment of the court below in this case or else overrule the Louisville bridge case.

Third.

"*Taxing Districts.*"

The court holds the bridge company liable for taxes assessed for railroad and school purposes, though assessed by the city authorities, upon the ground that the legislative acts authorizing such taxes in effect created taxing districts coextensive in boundary with the city, and that such taxes are not in fact for municipal purposes. We can add nothing to the brief already in the record in support of our position that these taxes are municipal taxes imposed for the benefit of the city as a municipal corporation, but we do propose to emphasize the proposition that the bridge beyond low-water mark on the Kentucky shore is not in the taxable boundary of the city, and, therefore, not in the "taxing district" created by the legislative acts authorizing the railroad and school taxes, those acts authorizing the city of Henderson to incur the debts to meet the interest
115 on which the taxes held to be legal in the opinion were imposed. They also authorized a tax upon the property in the city of Henderson to meet the accruing interest and ultimately to discharge the principal. Thus far there can be no controversy; but what "property is in the city of Henderson" in the meaning of those acts? what are the taxable boundaries of the city? are the vital questions on which depend the legality of these taxes.

It is a general rule of law that statutes should be construed so as to carry out the legislative intent as appears from the whole act. When the boundary of the city was extended to low-water mark on the Indiana shore what object did the legislature have in view? Was it to give the city the right to tax the bed of the river? That could not be supposed. It was not contemplated to extend city improvements or private property into the river; that would interfere with the right of the public to use this great highway of interstate commerce, and to violate the compact with Virginia by which the free navigation of the Ohio was secured to all the States bordering upon it. We must then look for some other object. It is easy to be seen. The river lay before the city. Unless her police authority extended over it, lawless and disorderly persons could violate her ordinances, and, flying to the river, make it a sanctuary

from which they could defy the city. The legislature, to give the city the means to protect her citizens against such a state of affairs, extended the boundary to give her authorities the power to enforce law and order and arrest offenders who might otherwise thus escape punishment. We cannot add to the conclusiveness and force of the opinion in the Louisville bridge case on this point, and therefore again reprint it.

116 "The necessity for extending the municipal government over the river was not to protect the property on the river, as was contended by appellee's counsel, but to catch fugitives who commit offenses in the city of Louisville and flee across the river to get beyond her jurisdiction. The extension of the boundary was proper on account of this police necessity; but the object of the legislature in making the extension of the city's boundaries for the protection of her citizens and property from criminals ought not to be misinterpreted and made the pretext of unjustly taxing property situated beyond the population, with neither actual nor presumed benefits from its municipal government, and not susceptible of ever becoming a part of the city, so as to be near to, occupied, or surrounded by its population" (page 202); and, by Judge Pryor, in the same case: "This extension of boundary was only intended to enlarge the police jurisdiction of the city, and not to make that taxable on the river that otherwise would not be the subject of taxation" (pages 204–5).

It is not an uncommon thing in this country for jurisdiction to be conferred on cities beyond their taxable boundary, and this court has often recognized the propriety and necessity for such legislation. The city of Henderson could never obtain any control over the bed of the river beyond low-water mark. It could not prescribe any rules for the navigation of the river, and the bridge company could not have erected the bridge but for the permission of the Federal Government. These undeniable facts show that the legislature, in extending the boundary over the river, had no thought of enlarging her taxing boundary or subjecting property to her municipal control and her burdens of taxation which was

117 not before subject thereto. It follows, therefore, that if the river was not included in the taxable boundary of the city by this jurisdictional boundary, it is not included in its taxable boundary as a taxing district. The acts creating the taxing districts, so called, fix no other bondary that that of the city, and the taxing districts can be no larger than the boundary of the city.

It may be asked, Why, then, is the bridge taxable for State revenues? We answer that all property within the limits of the sovereignty where located must pay it a proportion of the general expenses of the government. On the maintenance of the State depends the security and enjoyment of all property rights; but the security of individual rights is not dependent upon a municipal government, the creature of the sovereign power, and its right to tax property is measured by the benefits, actual or presumed, which it confers on the property sought to be taxed. This principle applies with more force to mere taxing districts, whose authority will not be construed

to extend beyond the boundary fixed by the act creating them. We reiterate that in this case the taxable boundary of the taxing districts for railroad and school purposes is limited to the taxable boundary of the city of Henderson. This view does not conflict with the views of the court in the case of the City of Henderson *vs.* Lambert, 8th Bush, 608, cited in the opinion herein, for, by the legislative acts involved in that case, it was the intention of the legislature to subject Lambert's land to all the taxes assessed by the city, and the act was held unconstitutional so far as it rendered the land liable for ordinary municipal taxes. We close this branch of the case by reprinting from the opinion in the Louisville
118 Bridge case the following language of the court: "The facts show that the bed of the river over which the part of the bridge sought to be subjected to municipal taxation is erected cannot possibly be laid off into town lots or streets, and that the city of Louisville, whose corporate limits include the Ohio river to low-water mark on the northwestern shore, has no right, if it were physically possible, to lay out the bed of the river into lots or extend its streets into it, because it would obstruct its free navigation and appropriate the river to purposes which nature never intended and the corporate limits of the city were never extended to effect. The appellants can never use their right of way as city property, and cannot receive any profit from — merely as such (page 200). It is not sufficient, to authorize municipal taxation, to show that the bridge was built within the corporate limits of the city, for the corporate limits may be, and in this instance are, larger than the taxable boundary of the city" (page 201).

The portion of the bridge beyond low-water mark on the Kentucky shore, being beyond the taxable limits of the city, is also beyond the limits of the taxing district, and is therefore not subject to taxation for railroad or school purposes.

Fourth.

The ordinance of the common council of appellee granting the right for the bridge on Fourth street provides (1) that the bridge, with its approaches, piers, trestles, etc., may be constructed from the center of Fourth street to low-water mark on the Indiana side of the Ohio river; (2) grants to the bridge company the right
119 to use a certain space of ground above and below the bridge; (3) specifies the elevation of the bridge approach above the street; (4) that damage done to private property shall be paid for by the bridge Co.; (5) that all structures on the space above and below the bridge shall be so made as not to obstruct the wharf, and (6) "that nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge Co. within the corporate limits of said city, the bridge itself, and all appurtenances thereto within the limits of said city."

This last clause does not seem to us to mean any more than it plainly says—that is, the city, by granting to the appellant the right to construct its bridge, does not "waive," surrender, or relinquish

from which they could defy the city. The legislature, to give the city the means to protect her citizens against such a state of affairs, extended the boundary to give her authorities the power to enforce law and order and arrest offenders who might otherwise thus escape punishment. We cannot add to the conclusiveness and force of the opinion in the Louisville bridge case on this point, and therefore again reprint it.

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117 not before subject thereto. It follows, therefore, that if the river was not included in the taxable boundary of the city by this jurisdictional boundary, it is not included in its taxable boundary as a taxing district. The acts creating the taxing districts, so called, fix no other bondary that that of the city, and the taxing districts can be no larger than the boundary of the city.

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to extend beyond the boundary fixed by the act creating them. We reiterate that in this case the taxable boundary of the taxing districts for railroad and school purposes is limited to the taxable boundary of the city of Henderson. This view does not conflict with the views of the court in the case of the City of Henderson *vs.* Lambert, 8th Bush, 608, cited in the opinion herein, for, by the legislative acts involved in that case, it was the intention of the legislature to subject Lambert's land to all the taxes assessed by the city, and the act was held unconstitutional so far as it rendered the land liable for ordinary municipal taxes. We close this branch of the case by reprinting from the opinion in the Louisville
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This last clause does not seem to us to mean any more than it plainly says—that is, the city, by granting to the appellant the right to construct its bridge, does not "waive," surrender, or relinquish

any legal right it would have had if the bridge had been built without the city granting the right of way. The language does not import that the bridge Co. conceded to the city a right to collect a tax which but for said provision the city would have no right to collect. The court, in the opinion, say: "This consent (to the use of Fourth street, etc.) was obtained by a binding and irrevocable contract with the city, and the city, in consideration thereof, reserved the right to collect taxes on the approach or on any building erected by appellant within the corporate limits of the city or on the bridge itself within said limits. This reserved right became a part of appellant's contract with the city and was just as binding and inviolate as any other part of the contract;" and again, "We do mean to decide that the appellee, as a taxing district, if she had no other authority, had the right under this agreement to assess and collect the taxes in question."

120 We feel certain that if the court will again carefully examine the whole ordinance—Transcript, pp. 16-23—and particularly the clause in question, it will plainly appear that the words "nothing herein shall be construed as waiving the right of the city to levy and collect taxes," etc., cannot themselves be construed as creating the right, nor as a concession on the part of the appellant that the right existed. The words do not mean any more than that the city does not give up any right of taxation which she then legally possessed. It was not intended by the provision that the city should acquire a right of taxation, but that she should avoid surrendering a right of taxation. It is impossible by any comment or argument to make the provision any plainer than the simple, natural import of the words themselves.

Fifth.

In the absence of legislative authority, taxes cannot be recovered by suit. It was so expressly held by this court in Louisville Water Co. *vs.* Commonwealth, Oct. 31, '89—Ky. L. Rep., vol. 11, No. 12, p. 414. The court there say: "It was held by this court in the case of Baldwin *vs.* Hewitt, auditor, etc., 11 Ky. Law Rep., 199, that taxes could not be recovered by suit in the absence of legislative authority, and there being no statute to this effect in this State, save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy."

The court then proceeds to elaborate and emphasize the argument. The next to the concluding paragraph of the opinion is: "If where a tax has been imposed and no remedy, or any adequate one, furnished for its collection by statute, it were, in our

121 opinion, a correct rule to imply the right to sue for it on account of the silence of the legislature, yet we would not apply it, in view of the fact that our legislature has expressly provided that a railroad corporation may be sued for its taxes. Gen'l Stats., chap. 92, art. 3, sec. 5. This was equivalent to a declaration by it that in the absence of such a statute no suit could — maintained."

The court in that case also expressly hold that it makes no differ-

ence that the proceeding is *in rem* and no personal judgment is sought. "No right exists to use the courts as a vehicle for the collection of tax claims."

The appellee had found out that such was the law, and therefore, on the 30th March, 1888, long after the institution of this suit, procured the passage of the following enabling act:

"For all taxes levied as hereinbefore authorized the city of Henderson shall have a lien, relating back to the day of assessment, upon all real and personal estate therein belonging to the persons or corporations owing such taxes, provided that purchasers of property from persons owing taxes shall be liable only for the taxes upon the property purchased; and said city is authorized to institute suit and enforce said lien in any of the courts of Henderson county having jurisdiction of the amount or the subject-matter, and no irregularity or error in assessment or in the suit, nor shall any dismissal of the suit by the court operate to discharge or release the lien of the city until the back taxes are paid. Said city is hereby further granted the same power and authority to sue for and recover personal judgment for taxes as in case of ordinary debt, and may have execution of *fieri facias* on said judgment." Section 7 of art. 9, chap. 928, acts 1887-'8, vol. 2, pp. 937, 992.

122 This act will serve the purpose of the city in the future, but it does not appear to be intended to authorize the institution of suits to recover taxes assessed before its passage, and certainly appellee will not contend that it makes good a suit instituted before its passage.

The appellee's counsel, to avoid the force of Water Co. *vs.* Commonwealth and other similar decisions, says in their brief, p. 15: "The bridge is substantially a railroad. Indeed it is nothing more nor less than a railroad—a railway on piers over a navigable stream—elevated so as not to interfere with navigation, and the same rule should, *ex necessitate rei*, be applied as to a railroad." Now, it is not alleged in the petition, nor in any other pleading in the case, that the Henderson bridge is a railroad, nor that the Henderson Bridge Co. is a railroad company; but, for the sake of the argument, we grant that the bridge is not a bridge, but is a railroad—a railroad on piers over a navigable stream—and then what follows? The appellee alleges in the petition that she caused this railroad on piers (missnamed a bridge) to be assessed for taxation, and that she levied the tax. The appellants say in their answer that it is not true that the city caused said bridge (railroad on piers) or any part thereof to be assessed, and that the whole of any such alleged and pretended assessments were and are void and of no effect. So that, we submit, that the court must either overrule Louisville Water Co. *vs.* Commonwealth or else hold no only that the bridge is a railroad, but that the city of Henderson may legally assess a railroad for taxation.

What is the law as to assessment of railroads for taxation? It is not that the assessment may be made by county or city
123 assessors, but only in the manner prescribed by art. 3 of chap. 92, Gen'l Statutes, which is but a re-enactment of the

act April 3, 1878. Acts 1878, vol. 1, p. 82. A part of section 4 of chap. 92, Gen'l Stats., is: "And all existing laws in this State authorizing the assessment and taxation of the property of railroad companies by counties, cities, or incorporated towns are hereby repealed, and no county, city, or incorporated town in this State shall hereafter assess, levy, or collect any taxes on the property of said railroad companies in this State, except as provided by this article." That has been the law since long before this suit was instituted.

We trust the court will bear with us if we are unable to understand how the court can affirm the judgment in this case without overruling Louisville Water Co. *vs.* Commonwealth.

Sixth.

The pleadings and appellant's brief raise still another question, which the court does not notice, but which we believe is worthy of the court's attention, and we respectfully request the court to pass upon it.

"No State shall pass any law impairing the obligation of contracts." U. S. Con., sec. 10, art. 1.

"Their validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law. The same principle applies where there is a change in judicial decision as to the constitutional power of the legislature to enact the law."

Gelpeke *vs.* City of Dubuque, 1 Wallace, 206, and cases cited.
Havemeyer *vs.* Iowa Co., 3 Wall., 294.
Olcott *vs.* Supervisors, 16 Wall., 678.

124 "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention resulting from the stipulations in the contract necessarily impairs it." Story on Con., sec. 1385.

The Louisville Bridge case was decided and promulgated as the law of the State in January, 1883. That case determined the law of this State to be that a bridge spanning the Ohio river—such a structure as the Henderson bridge—was not subject to taxation by a municipal government, either for railroad, school, or city purposes. Under the law of that case the construction of the Henderson bridge was begun. Under the authority of the case an important contract was entered into between the appellant, the bridge Co., and the appellant, the Louisville & Nashville Railroad Co. That contract was that for the yearly sum of $10,000, to be paid by the bridge Co. to the railroad Co., the latter would keep the bridge in repair and pay all legally assessed taxes on the bridge. The railroad Co. is made a party defendant to this suit, and files its answer and sets up this contract and pleads the decision of the Louisville Bridge case as the law in force at the time the contract was entered into. The decision in that case was as much the law of the State as was any statute. That decision was the law of that contract—that the bridge could not be subjected to the character of taxation which is by the decision of this court now imposed upon it. We submit that

the court cannot change the law of the State so as to impose a greatly heavier burden upon the appellant railroad than could be imposed upon it under the law as it existed at the time the contract was entered into.

125 We know that counsel on the losing side are often hard to convince, but in this case we feel so sure that the court has, owing to the immense mass of business crowding its docket, the records in many cases running into the thousands of pages, inadvertantly overlooked a very material part of this record, and has taken a too restricted view of the questions that were involved and decided by this court in the Louisville Bridge case, that we are led, with great confidence, to pray the court to grant a rehearing and reverse the judgment of the court below.

H. W. BRUCE,
WM. LINDSAY,
YEAMAN & LOCKETT,
For Appellants and Petitioners.

The following is the petition of appellee, filed by the foregoing order:

Appellee's Petition for Rehearing.

We do not desire to reargue this case, but we do wish to invite the attention of the court to some important questions which have been evidently overlooked.

We think it was an oversight in the court to hold that the question involving the right to tax the bridge for municipal purposes proper was not before the court.

It is alleged in the petition (see Record, page 5) that by virtue of the charter of the city of Henderson and the acts amendatory thereof, approved March 3, 1880, the "city of Henderson was authorized and empowered to annually levy and collect taxes to defray the expenses of the city government, at the rate of not ex-

126 ceeding sixty cents on each one hundred dollars' worth of property within the city limits made taxable by law for State purposes," &c., &c.

It is also alleged (see Record, page 9) that the "city caused said bridge to be assessed for taxation for the year 1886 and 1887 at a valuation each year of one million of dollars, which was its fair cash value, to pay the interest on the bonded indebtedness aforesaid, and to defray the ordinary expenses of the city government, and to pay the tax for repairing and improving the gas works, and to defray the general expenses of said public schools."

It is alleged (see Record, page 10) that "the tax on the bridge for the year 1886 to defray the annual expenses of the city government amounted to $5,200," and to pay the annual expenses of the city government for the year 1887 the tax on the bridge amounted to $5,000. (Record, page 11.)

It is alleged in the petition (Record, page 12) that "on the 22d day of June, 1886, the said city duly passed and adopted an ordinance providing for the annual tax levied for 1886, and to pay the

taxes due said city for the year 1886 the said city did by said ordidance order and direct to be collected the following tax upon all property in said city taxable by law as aforesaid, viz., an ad valorem tax of 52 cents on the $100 worth of property to pay the annual expenses of the city government."

The same allegations as to the levy of the taxes and the passage of the tax ordinance for the year 1887 were made in the petition. (See Record, page 14.) The tax to defray the ordinary expenses of the city government for the year 1887 was 50 cents on each one hundred dollars' worth of property. The total taxes due by appellant for the year 1886, including all purposes, aggregated
127 $17,384 (Record, page 10), and the court below rendered judgment for that amount. The total amount of taxes for all purposes due by appellant for the year 1887 amounted to $15,810 (Record, page 11), and the court below rendered judgment for that amount (Record, pages 85, '6). Upon an examination of the portions of the record as above indicated the court will see that the question as to the liability of the bridge for taxes to defray the ordinary expenses of the municipal government is as fully and clearly before the court as the question of taxation for school and railroad purposes.

In the year 1878 the city of Henderson had outstanding a bonded indebtedness of about $500,000.

(*a.*) Three hundred thousand dollars of these bonds were railroad bonds and were issued by authority of the charter of the old Evansville, Henderson & Nashville Railroad Company and were *were* used to aid in building said railroad (said railroad being now owned and operated by the L. & N. R. R. Co.).

(*b.*) Fifty thousand dollars of said bonds were school bonds and were issued by authority of an act of the legislature establishing a system of public schools in the city of Henderson.

(*c.*) One hundred thousand dollars of said bonds were water-works bonds and issued by authority of an act to incorporate the Henderson Water Works Co. Record, page 3.

The remainder of said bonds, amounting to $—, were issued for general city purposes by authority of an act amending the charter of the city of Henderson. Record, page 4.

By an act of the legislature approved January 30, 1878, and the acts amendatory thereof (Record, page 4) the city of Henderson
128 was authorized to and did, in 1881, fund this five hundred thousand dollars of bonded indebtedness into bonds bearing a lower rate of interest. All of said bonds as provided in said act retained their indentity—that is—

(1.) The $300,000 of railroad bonds were funded into railroad bonds (or funding bonds, series A).

(2.) The $50,000 of school bonds were funded into school bonds (or funding bonds, series B).

(3.) The $100,000 of water-works bonds were funded into water-works bonds (or funding bonds, series D).

(4.) The remaining bonds issued for city purposes going to make

up the $500,000 were funded into bonds denominated city funding bonds, (series C).

All the old bonds of the city have been cancelled, and the said city has no other bonds in existence except these four series.

Now, the taxes to pay the interest on these four series of bonds were levied by authority of the funding act of 1878 as amended in 1881 (Record, page 4) and by virtue of the tax ordinances directing the tax levies of 1886 and 1887. Record, page 12 and 14.

The city has no authority to levy taxes to pay the interest on these funding bonds except by reason of this funding act of 1878 and its amendments, and the authority to levy taxes to pay interest on all these bonds is derived from the same act.

It will be seen by reference to these tax ordinances that the city was authorized to and did levy a tax to pay the current annual expenses of the public schools of the city.

Now, we understand this court to hold, in its opinion of June 21, that the bridge to low-water mark on the Indiana shore is taxable for three purposes, viz:

(1.) To pay the interest on the railroad bonds (or funding
129 bonds, series A.)

(2.) To pay the interest on the school bonds (or funding bonds, series B).

(3.) To pay the current annual expenses of the public schools of the city.

And we understand from the opinion of the court that neither of the three following questions is decided, viz:

(1.) Whether the bridge is taxable by the city to defray the ordinary municipal expenses of the city government.

(2.) Whether the bridge is taxable to pay the interest on the water-works bonds (or funding bonds, series D).

(3.) Whether the bridge is taxable to pay the interest on the bonds issued for municipal purposes and known as city funding bonds, (series C).

This court has held that agricultural land was not subject to municipal taxation, because it received nothing in return for the taxes it paid. This bridge re-ived not only the right of way over Fourth street, but the absolute use of one hundred feet of the river front below and three hundred feet above the bridge.

It seems to us that this consideration, outside of the elements of a contract, will take the case out of the rule of agricultural exemptions. This court held, and we think properly so, that the terms of the ordinance by which the appellant was granted the use of the river front aforesaid and the right of way over Fourth street constituted a contract which bound the appellant to pay taxes to the city. This contract was made by the city of Henderson, not as a taxing district, but as a municipality. If this contract was made by the city in her municipal capacity and it bound the bridge
130 company, as the opinion holds, to pay taxes for school and railroad purposes, we think it would bind the appellant to the payment of taxes, not only for the ordinary expenses of the municipal government, but also to pay the taxes on the water-works

bonds (series D) and to pay taxes on the bonds known as city funding bonds (series C).

Appellee asked judgment for taxes for the years 1885, 1886, and '87. The court below gave us judgment for taxes for the years 1886 and '87, but refused a judgment for taxes for the year 1885 because the bridge was not completed until in July, 1885. Appellee prosecuted no appeal from the judgment refusing taxes for 1885. On page 5, Record, the right to levy and collect a tax of 15 cents on the $100 for repairing gas works was alleged, but the act authorizing this tax ceased to exist after the year 1885, and no tax is levied for that purpose for any year except 1885; consequently the right to tax for gas purposes is abandoned in this suit.

It is not our purpose, in asking a rehearing, to argue this case again; but we wished to point out in the record those questions which we think are raised by the pleadings, and we do this simply to have these questions settled and to save the necessity of another lawsuit. Our argument is in our brief, which is on file in this suit.

We respectfully ask this court to modify its opinion as to—

(1.) The tax to defray the municipal expenses of the city government.

(2.) The tax to pay interest on water-works bonds (or funding bonds, series D).

(3.) The tax to pay interest on the bonds issued for municipal purposes and known as city funding bonds (series C).

131 A modification of the opinion to the extent above suggested is requested by appellee.

JOHN YOUNG BROWN,
MONTGOMERY MERRITT,
J. L. DORSEY,
Counsel for Appellee.

Appellant insists that appellee had no right to sue for taxes. We think this question is settled in the Covington Bridge case, referred to in our brief. Besides, this court, properly we think, construed the ordinance granting the right of way over 4th street to be a contract. If this be true the bridge company violated this contract when it refused to pay the taxes.

And how could the city enforce the terms of its contract except by suit in court?

Afterward, on the 7th day of October, 1890, the following orders and judgments were entered herein:

Order Setting Aside Former Judg't; Withdrawing Opinion; Delivering New Opin.; Judg't.

The court being sufficiently advised, it is considered that the appellant's petition for a rehearing herein be overruled and the appellee's petition sustained. The former opinion is withdrawn, the mandate set aside, and a new opinion delivered, and it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that appellee recover of appellant ten per cent. damages on the amount of the judgment superseded herein, which is ordered to be certified to said court (Judge Pryor dissenting, Chief Justice Hole delivering a separate opinion).

It is further considered that appellee recover of appellant its cost expended herein.

The following is the opinion of the court, delivered on the 7th day of October, 1890:

132 The appellant was organized under an act of the legislature of this State approved February the 9th, 1872, for the purpose of erecting and equipping a rail-bridge across the Ohio river and of charging certain tolls for the crossing of railroad trains thereon. The City of Henderson, the appellee, by its ordinance approved — day of ——, 18—, and accepted by the appellant on the 10th day of February, 1882, granted to the appellant the right to construct on or over the center of its Fourth street and on the line thereof to low-water mark on the Indiana side of the Ohio river, &c., &c.; also the right of use of the land between Water street, in said city, and low-water mark on the Kentucky side of the Ohio river, extending one hundred feet below and three hundred feet above the said Fourth street, was granted to the appellant for erecting such wharves, elevators, or other buildings deemed necessary or convenient for the successful operation of said company. It was also provided in said ordinance: "Nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge or any building erected by said bridge company within the corporate limits of said city, the bridge itself, and all appurtenances thereto, within the limits of said city."

The appellant's bridge was constructed across the Ohio river at the place designated in the above-named ordinance. The appellee caused all that part of appellant's bridge situated on the Ohio river south of low-water mark on the Indiana shore to be taxed for
133 the purpose of paying the railroad and school taxes that the appellee was authorized to impose and collect on real estate within her limits; also the taxes for municipal purposes. The appellant contends that, as its bridge is not protected by the city and as it does not receive any of its benefits, it should not be taxed by the city for city governmental purposes proper or other local purposes which the city government may be authorized to levy and collect on the real property within her limits. The Louisville Bridge Co. *vs.* The City of Louisville, 81 Ky., and other cases, are relied on in support of this contention. In the Louisville bridge case and others, referred to by counsel, all that is decided is that, in order to authorize the city government to subject real estate situated within its corporate limits to taxation for city or municipal purpurses only, there must be actual or presumed benefits to such property by the city government being extended over it. It is upon this principle that farming lands taken into the corporate

limits of the city merely for the purpose of increasing the city revenue—*i. e.*, for the exclusive benefit of the city—cannot be taxed by the city for municipal purposes only. There must be some actual or presumed benefit to authorize such taxation. Accordingly, this court held in the case *supra* that the Louisville bridge received no actual or presumed benefit from the city government proper, and consequently the bridge was not subject to city or municipal taxation; but, independently of this principle, this court has long since and often distinguished between the power of the city to tax real estate situated within its limits for city or municipal purposes only and for such district pur-
134 poses as the legislature might authorize; that the legislature might create a city boundary, or designate any other boundary without reference to existing civil or political districts, into taxing districts for certain local purposes. For instance, it is held in the case of The County Judge of Shelby County *vs.* The Shelby R. R. Co., 5 Bush, 225, that the legislature could create a certain portion of Shelby county into a taxing district for the purpose of aiding in the construction of a railroad through such district. The court in that case approves the language of the court in the case of The Peoples *vs.* Lawrence, 36 Barb., N. Y., to the effect that the "legislature is not confined in such taxation to existing political divisions. They may create a district for the purpose of taxation or assessment." Also in case of Burnett *vs.* Sacramento, 12 California, R.: "The burden may be levied upon the whole county or town or on those most immediately benefitted."

This court, in the case of The City of Henderson *vs.* Lambert, 8 Bush., 608, has decided that the act of March the 9th, 1867, authorizing certain counties, cities, &c., to aid in building the Evansville, Henderson and Nashville railroad, and authorizing such counties, cities, &c., to levy and collect a tax for the purpose of paying, &c., any subscription that they might make to the capital stock of said road, had the effect to make such counties and cities voting said tax taxing districts, and we now hold that the appellee, having voted said tax, is a taxing district. She voted said tax, not under her ordinary powers of taxation for city or municipal purposes, but as a taxing district. In the same case it was held that, as the
135 act of March the 15th, 1869, provided "that all the territory now embraced within the city of Henderson shall be and is incorporated as a school district, which shall be under the control and management of a board of trustees appointed by the mayor," &c., such territory constituted a taxing district, and the right to tax the land within such boundary for school purposes and the right of the city to tax the same land for city purposes rested upon a different footing; that the former could not be deemed a city or municipal tax, but was a district tax, notwithstanding it was to be collected by the ordinary collecting agencies of the city. We see no good reason why the boundary of a town or city should not be made a taxing district, as distinguished from the ordinary taxing power of the towns or cities, as well as other designated localities where there are no towns or cities. Under the power of the city to

tax for the ordinary purpose of carrying on the city government she cannot impose a tax upon the estate within her limits for the purpose of aiding in building a railroads or supporting schools. For such purpose there must be express authority, and that authority need not be conferred upon the city as a city, but as a taxing district, and the authority may be given the city authorities to collect this tax without militating against the proposition that such territory is a taxing district.

The city may, as a taxing district, assess property within its limits and collect the taxes thereon that she would not be authorized to assess and collect for municipal purposes only. In the former case the inquiry is, Is the property within the taxing district, and does the act authorize its taxation? In the latter case the inquiry
136 is, Is the property benefitted, or presumably benefitted, by the taxation? In the former case the legislature has authorized the voters of the district to vote the railroad or school tax upon the assumption that it will be a benefit to that or succeeding generations in the way of financial, moral, or intellectual improvement. The assumption may turn out to be a mistake, or the enterprise may be only partially successful, or it may be detrimental. The chances *pro* and *con.* must, in voting, be deemed to have been considered, and each voter must be deemed to have agreed to take the risk of a benefit or a detriment and to pay the tax voted without reference to how that matter may ultimately turn out. After such tax is voted the owner of real estate situated in the taxing district will not be heard to say that his property thus situated is not benefitted by the enterprise for which the tax was voted, and, in the nature of things, cannot be benefitted by it. None of the real estate may be, in fact, benefitted by it, and if one could be released of the tax because he was not benefitted by it, why not all?

The answer is that the tax is authorized and voted upon the assumption that it will be beneficial, and if this assumption turns out to be a mistake as to this or that piece of property, the tax must, nevertheless, be paid upon all of it. It has been held by this court, in the case of McFerran *vs.* Alloway, 14 Bush, 581, that an island situated in the Ohio river, near the Indiana shore, and which could not be benefitted by the building and the running of a railroad through the district to which the island belonged and was a
137 part, was, nevertheless, liable for the tax that the district voted in aid of said railroad. The court in that case said: "The power on the part of the legislature to establish the district or to authorize the particular precinct to vote the tax is conceded, and the fact that the local improvement has been or is being constructed in the taxing district is also admitted, and in such a case it seems to us the legislative discretion on the subject must control. The court has so often determined that such power existed in the legislature of this State that it is no longer an open question, and the benefits to be derived from those living in the locality of the improvement having been determined by the legislature in passing upon the act under which the tax was imposed, the court has no revisory power over it. In the judgment of the legislature, this tax

district is benefitted by the improvement, and the fact that an actual benefit is not derived by one living in a remote part of the district, in which it is difficult to approach the road or highway, is not an argument against the imposition of the burden."

It is well settled that the appellee's jurisdiction extends to the low-water mark on the Indiana shore, but she cannot tax property such as the appellant's situated on said river, or that is surrounded by said river, such as an island, for city or municipal purposes, for the reasons already indicated; but it is manifest that the appellee, as a taxing district, may tax such property. If it was an island in the Ohio river, fronting the appellee, no one would doubt that the appellee, as a taxing district, could tax it. Instead, the
138 appellant's property, which is realty and extends across the Ohio river, is taxed. This property is used for profit and cannot be less benefitted by the appellee than an island would be if situated in the middle of the river or near the Indiana shore, yet the appellee, as a taxing district, may tax the island, and we see no good reason why the same rule should not be applied to the appellant's property.

The appellee also seeks tax the appellant for municipal purposes generally. This the appellee, according to the decision in the Louisville bridge case, *supra*, cannot do. This, as said, the appellee cannot do, because the appellant's property, being situated in the Ohio river, is not sufficiently benefitted by the appellee's government to authorize it to tax the appellant's said property for the support of its government proper. So, the question is, Does the contract entered into between the appellant and appellee, in which the appellant secured certain rights and privileges from the appellee, and in consideration thereof the appellee reserved the right to tax the appellant's entire structure within its jurisdiction, amount to a contract right to tax the appellant's property to low-water mark on the Indiana shore?

It is conceded, according to the Louisville bridge case, that the appellee's jurisdiction to the Indiana shore is for police purposes only; but it is clear that this is owing to the fact that the property situated in or over the water of the Ohio river, not being actually or presumably benefitted by the city government, is not subject to the payment of municipal taxes; consequently the juris-
139 diction of the appellee on said water is, of necessity, ordinarily confined to police purposes only. So, as said, the question is, Has the appellee the power to tax said property by reason of a contract made with the appellant?

Now, the appellant obtained from the appellee the right to construct its bridge and approaches on or over the center of its Fourth street and on the line thereof to low-water mark on the Indiana side of the Ohio river, &c.; also the right to the use of the land between Water street, in said city, and low-water mark on the Kentucky side of the Ohio river, extending one hundred feet below and three hundred feet above the said Fourth street, was granted to the appellant for erecting such wharves, elevators, or other building- deemed

necessary or convenient for the successful operation of said enterprise.

In consideration of said grant it was agreed: "Nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge or any buildings erected by said bride company within the corporate limits of said city, the bride itself, and all appurtenances thereto, within the limits of said city."

The appellant contends it was only meant to reserve the right to tax such property of the appellant as was theretofore subject to taxation by the city government, and as that part of the bridge situated on the water of the Ohio river was not, for the reason above indicated, subject to taxation, the reservation relates to that part of the bridge, &c., that the appellee had the right to tax under the law. It is evident that the contract was well considered and
140 prudently drafted by men skilled in that kind of work, and it is not presumed that they engaged in a mere *nudum pactum*, but they meant to set forth a business transaction. Now, that business transaction was evidently this: The appellant desired rights and privileges that it did not possess, and which it could not possess without the consent of the appellee. So it said to the appellee, Grant these privileges and you may tax what? Only the approach to said bridge? No; because the appellee already had the right to tax that, and it had made no concessions that could possibly be construed as waiving that right. What right, then, was granted? Why, the right to tax the "bridge itself." The bridge, as distinguished from its abutments and approaches, is that part that is over the water. Now, the appellee, according to the Louisville Bridge case, in its municipal capacity, had no right to tax that part of bridge over the water. Why, then, say that it did not waive the right to tax it? To waive a right there must be a claim of right to waive. Well, it is said, as the appellee had no right to tax the bridge, there was, in fact, no right to waive. As an abstract proposition of the right to tax the bridge on the water (according to said case) this contention is true; but it is equally true that the appellee had the right, if asserted and agreed to, to claim that the bridge should be taxed in consideration of the privileges granted. This claim of right, it must be presumed, was asserted and agreed to and expressed in the contract by the term "not waiving the right." If the contract does not mean this, then it means nothing. It is not supposed that the contracting parties only meant to reserve
141 a right that they already had and about which there was no possible ground of dispute; but when it is considered that the right to tax the bridge to the Indiana shore might be legitimately obtained by contract, and that the appellee granted to the appellant rights and privileges essential to its enterprise, designed to make make money and is making a large per sent., it is entirely reasonable to suppose that the appellee would contract for the right to thus tax the appellant, in consideration of granting these essential rights and privileges, by which the appellant acquired the right to construct and operate so profitable a business enterprise.

So it seems much more reasonable to suppose that the contracting parties intended to do this reasonable thing, to wit, to receive some consideration for the grant of privileges, rather indulge in a mere *nudum pactum*.

The appellant, at least for the purpose — collecting taxes, should be considered as a part of a railroad; consequently falls within the principle announced in Elizabethtown and Paducah R. R. *vs.* Trustees of Elizabethtown, 12 Bush, 239; opinion by Judge Lindsey. The judgment is affirmed.

— —.

I dissent from the opinion.

— —.

Chief Justice Holt delivered the following separate opinion:

The legislature, by authorizing the imposition and collection of the railroad and school taxes upon the real estate within the city limits, created a taxing district. The power to collect these
142 taxes was therefore conferred upon the appellee as such a district, and the appellant's property, being within it, is liable for them.

As to the municipal taxes proper, the appellant's property is within the corporate limits, and, in my opinion, receives such benefits from the municipal government as render it both legally and justly liable for them.

Upon these grounds I concur in an affirmance of the judgment of the lower court.

Afterwards, on the 10th day of January, 1891, the plaintiffs in error, The Henderson Bridge Company and The Louisville & Nashville Railroad Co., filed in the clerk's office of the court of appeals their writ of error, supersedeas bond, & citation. Said writ and bond are copied herein in words & figures following:

143 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the court of appeals of the State Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Henderson Bridge Company and The Louisville and Nashville Railroad Company, defendants and appellants, and The City of Henderson, plaintiff and appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was

drawn in question the construction of a clause of the Consti-
144 tution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Henderson Bridge Company and The Louisville and Nashville Railroad Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the third day of January, in the year of our Lord one thousand eight hundred and ninety-one.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) D. J. BREWER, *Justice Sup. Ct.*

145 Know all men by these presents that we, the Henderson Bridge Company and the Louisville & Nashville R. R. Co., as principals, and John D. Taggart and John A. Carter, as sureties, are held and firmly bound unto the City of Henderson in the full and just sum of sixty-six thousand dollars, to be paid to the said The City of Henderson, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a court of appeals of the State of Kentucky, in a suit depending in said court between The Henderson Bridge Company and The Louisville and Nashville Railroad Company, defendants and appellants, and The City of Henderson, plaintiff and appellee, a judgment was rendered against the said The Henderson Bridge Company and The Louisville and Nashville Railroad Company, and the said The Henderson Bridge Company and The Louisville and Nashville Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City of Henderson, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Henderson Bridge Company and The Louisville & Nashville Railroad Company shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

THE HENDERSON BRIDGE COMPANY,
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, [SEAL.]
By WILLIAM LINDSAY, *Attorney.* [SEAL.]
JOHN D. TAGGART & [SEAL.]
JOHN A. CARTER,
By WILLIAM LINDSAY, [SEAL.]
Attorney-in-Fact.

Approved by & allowed as supersedeas:
D. J. BREWER, *Justice Sup. Ct.*

146 Afterwards, on the 19th day of January, 1891, the plaintiffs in error filed in the clerk's office of the court of appeals their assignments of error in words and figures following, to wit:

Supreme Court of the United States.

THE HENDERSON BRIDGE COMPANY and The Louisville & Nashville Railroad Company, Plaintiffs in Error,
vs.
THE CITY OF HENDERSON, Defendant in Error.
} Assignment of Errors.

The Henderson Bridge Company assigns for error:

First. That the court of appeals of Kentucky erred in overruling its claim that the acceptance of its charter from the Commonwealth of Kentucky and the construction of its bridge structure thereunder amounted in law to a contract between the said Commonwealth and the said bridge company that no part of its bridge structure situated and being north of low-water mark on the Kentucky shore of the Ohio river should ever be subjected to taxation by the city of Henderson, the defendant in error, for municipal or any other purpose.

Second. Said court erred in overruling its claim that the
147 tax ordinances of the said city of Henderson, under which the right to assess and enforce the collection of the taxes here in contest by the defendant in error, are null and void so far as they authorized plaintiff's bridge structure situated and being north of low-water mark on the Kentucky shore of the Ohio river, because they seek to impair the obligations of the plaintiff's charter contract with the Commonwealth of Kentucky, and are repugnant to the Constitution of the United States.

Third. Said court of appeals erred in overruling the said plaintiff's

claim that its bridge structure is exempt from the taxation in contest because it spans the Ohio river, a navigable stream and interstate river, and is solely and exclusively a means or instrumentality of interstate commerce, erected by and with the consent and under authority from the United States, and receiving no aid, assistance, or protection from the defendant in error, The City of Henderson.

Fourth. The court of appeals erred in rendering the judg-
148 ment sought to be reversed by the Supreme Court of the United States, because it is contrary to the law of the controversy and in opposition to the rights of the said plaintiff in error secured to it by the Constitution and laws of the United States.

Fifth. Both the plaintiffs in error, The Henderson Bridge Company and The Louisville & Nashville Railroad Company, say the said court of appeals erred in overruling their claim that the tax ordinances of the city of Henderson impaired the obligations of the contract between the said two plaintiffs entered into February 27, 1884, and are therefore null and void, because repugnant to the Constitution of the United States.

Sixth. Both said plaintiffs in error say the court of appeals erred in rendering the judgment herein sought to be reversed, because it is in opposition to their rights secured to them and each of them by the Constitution and laws of the United States.

WILLIAM LINDSAY,
For the Plaintiffs in Error.

149 COMMONWEALTH OF KENTUCKY:

I, Woodford W. Longmoor, clerk of the court of appeals of Kentucky, certify the preceding one hundred and forty-eight pages contain a true, full, and complete transcript of the record and proceedings had in said court in the case of The Henderson Bridge Company, appellant, against The City of Henderson, appellee, together with copies of the writ of error and supersedeas bond allowed and approved by D. J. Brewer, justice Supreme Court of the United States; also assignment of errors filed by plaintiffs in error, as appears of record and on file in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office.

Seal Kentucky Court of Appeals.

Done at Frankfort, Kentucky, on this the 19th day of January, A. D. 1891.

WOODFORD W. LONGMOOR,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript, $56.50.

Endorsed on cover: Case No. 14456. Kentucky court of appeals. No. 1007. The Henderson Bridge Company and The Louisville and Nashville Railroad Company, plaintiffs in error, *vs.* The City of Henderson. Filed January 20, 1891.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE HENDERSON BRIDGE CO. and
THE L. & N. RAILROAD CO., Plaintiffs in Error,

VERSUS

THE CITY OF HENDERSON, Defendant in Error.

Response to, and Brief Upon, Motion of Defendant to Dismiss Writ of Error.

WILLIAM LINDSAY,
Counsel for Plaintiffs in Error.

Yeaman & Lockett,
Of Counsel.

ROUNDABOUT PRINT, FRANKFORT, KY.

Supreme Court of the United States.

THE HENDERSON BRIDGE CO., AND
THE L. & N. RAILROAD CO., PLAINTIFFS IN ERROR.

VERSUS

THE CITY OF HENDERSON, DEFENDANT IN ERROR.

Response to, and Brief Upon, Motion of Defendant to Dismiss Writ of Error.

STATEMENT.

By an act of the General Assembly of the Commonwealth of Kentucky, approved February 9, 1872 (session acts, vol. 1, page 314, Session 1871-72), provision was made for the organization of a company to construct a railway bridge across the Ohio river, extending from a convenient point within the corporate limits of the city of Henderson to the Indiana shore. The company was to have power to purchase or condemn the necessary real estate for the site of the bridge, and for

the sites for piers, abutments, toll houses and suitable avenues leading to the bridge, and was so to construct its bridge as not to interfere with the navigation of the Ohio river, further than the laws of Congress should allow. The act contains no provision requiring the Bridge Company to obtain the consent of the city of Henderson to the erection of the bridge, or to the use of the necessary piers, abutments or approaches. The grant was absolute and unqualified, so far as the city authorities of the city of Henderson were concerned.

Prior to 1882, the Bridge Company was organized, and in that year commenced the construction of its bridge. The structure was completed in the latter part of 1885. The city of Henderson, by its common council, adopted an ordinance granting the use of certain streets and public grounds to the Bridge Company, and on the 11th of February, 1882, that ordinance was accepted by the company, with the agreement to "abide by and faithfully keep the terms and conditions of" the same.

Among other things the ordinance contains the following proviso or condition:

"Section 4. That nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or on any building erected by said bridge within the cor-

porate limits of said city, the bridge itself and all appurtances thereto, within the limits of said city."

The bridge, except the approach, was constructed upon stone piers or pillars, resting upon the bed of the Ohio river. The water under and at each side of the bridge, and for the whole length thereof, flows from five to fifty feet in depth. No part of the ground spanned by the bridge has been, or can be laid off into lots or streets, or used for places of business or residence, for the all-sufficient reason that it constitutes the bed of the Ohio river, and is at all times covered by the waters of the river. The bridge is not, and can not be used as a passway from one part of the city to another, and it derives no benefit or protection, or advantage from the city government. The city of Henderson contains a population of less than 10,000.

The city council of the city of Henderson adopted three several ordinances, providing for the levy and collection of city or municipal taxes for the years 1885, 1886 and 1887. They are set out in full in the printed transcripts and described as exhibits C., D. and E., pages 13, 17 and 21.

In virtue of those ordinances, the city caused the railway bridge to be assessed for taxation for each of the years 1885, 1886 and 1887. The Bridge Company refused to pay the taxes upon the value of so much of the bridge as spanned the Ohio river, and ex-

tended northwardly from low water mark on the Kentucky shore. To enforce the collection of the alleged taxes, the city sued the Bridge Company in the Henderson Circuit Court. The Louisville & Nashville Railroad Company became a party defendant, to the pending suit. The said companies defended, on the ground that the bridge property situated north of the low water line of the Kentucky shore was exempt from taxation by the city, and that to enforce the collection of the taxes claimed would be to impair the obligations of certain contracts, protected alike by the Constitutions of Kentucky and the United States.

These defenses were overruled by the circuit court, and judgment rendered against the Bridge Company for the taxes claimed for 1886, $17,384, and also for those claimed for the year 1887, $15,810. The claim for 1885 was disallowed because the bridge was not completed until the close of that year. The two companies prosecuted an appeal from that judgment to the Court of Appeals of Kentucky. In that court the companies also claimed that they were protected against the taxation in contest by the State and Federal Constitutions. By a divided court the judgment of the circuit court was affirmed, and the cause is now before this court upon a writ of error, granted by Mr. Justice Brewer.

Counsel for defendants in error are mistaken in the

statement that a writ of error was refused by the Chief Justice of the Kentucky Court of Appeals. No application was made to the Chief Justice for the writ.

The defendant in error moves to dismiss the writ upon the grounds, first, that the record presented no Federal question to the State courts; and second, if a Federal question was presented, the judgment of the Court of Appeals was rested upon grounds broad enough to sustain it without reference to the Federal question. Both the propositions can, we think, be successfully controverted.

For response to the motion to dismiss the writ of error, counsel for the plaintiffs in error submit the following:

CONTRACTS.

We maintain that by the acceptance of the charter of February 9, 1872, and the expenditure of the large sums of money necessary for the construction of the bridge, a contract was consummated between the State of Kentucky and the Bridge Company, whereby the city of Henderson was forever prohibited from taxing any portion of the bridge structure spanning the Ohio river, and situated north of low water mark on the Kentucky shore. At the time of the organization of the Bridge Company, in 1882, and when the work of construction was commenced, and up to 1886, when it was completed, it was the settled law of

the State of Kentucky that no real property within the territorial limits of a city or town could be constitutionally taxed for municipal purposes, unless the same received from the city government benefits, actual or presumed, and there was a town or city population, on or near the land, that created the necessity for, or at least rendered it not unreasonable, that the taxing power of the municipal government should be extended over it.

This rule of constitutional construction was declared by the Court of Appeals of Kentucky in 1848, when the Constitution of 1799 was in force. (Cheany v. Hoover, 9. B. Monroe, —.)

It has been repeatedly re-affirmed by the same court since the adoption of the Constitution of 1849.

In 1854, in the case of Covington v. Southgate (15 B. Monroe, 398).

In 1876, in Courtney v. City of Louisville (12 Bush, 419), where it was said:

"If the single fact that land is made more valuable by improvements constructed by a municipal government, is all that is required to authorize it to tax the land benefited, the area of city taxation would depend upon the energy with which such improvements were pushed into the country rather than upon the area occupied by a city population."

It was again declared, and enforced, in 1883, in Louisville Bridge Company v. City of Louisville (81 Ky. Reps., 189), where the court said:

"It is not sufficient to authorize municipal taxation

to show that the bridge was built within the corporate limits of the city, for the corporate limits may be, and in this instance are, larger than the taxable boundary of the city. At the time the bridge was built the real estate, the bed of the river, could not be subjected to city taxation, and it remains exempt from that power. If, therefore, the appellee's claim to tax the bridge be adopted by the court, the anomoly in law and to common sense will appear that immovable and permanent buildings erected upon the soil, and considered in law as a part of it, and as real estate may be taxed, although the soil and all beneath it, and the use of the water which flows over it, are constitutionally exempt from municipal taxation. This rule can not be logically applied to permanent buildings on dry land, and it will not be adopted as to buildings erected on land covered by water."

the rule was enforced

~~And~~ again in 1890, in Town of Parkland v. Gaines (88 Ky. Reps., 562), and ~~also~~ was declared to be the existing rule by the opinion on file in this cause, claimed by the defendant in error to be the principal opinion delivered by the Court of Appeals. On page 76, printed transcript, that opinion reads thus:

"The appellee also seeks to tax the appellant for municipal purposes generally. This the appellee, according to the decision in the Louisville bridge case, *supra*, can not do. This, as said, the appellee can not do, because the appellant's property, being situated in the Ohio river, is not sufficiently benefited by the appellee's government to authorize it to tax the appellant's property for the support of its government proper." * * * * * * * *

"It is conceded, according to the Louisville bridge case, that the appellee's jurisdiction to the Indiana shore is for police purposes only; but it is clear that this is owing to the fact that the property, situated in or over the water of the Ohio river, not being actually or permanently benefited by the city of government, is not subject to the payment of municipal taxes."

These cases establish beyond all doubt that since 1848 it has been the settled law of Kentucky that while real estate may be situated within the boundary lines of the territory constituting a town or city, yet it does not follow that it may be constitutionally taxed for municipal purposes. But, upon the contrary, in order to make it constitutional to tax such property for city purposes—

"There must be both benefits, actual or presumed, and a town or city population on or near the land creating the necessity, or at least rendering it not unreasonable that the municipal government should be extended over. But if, conceding the location of the property with respect to actual population, it plainly appears that it is not near enough to such population to require municipal government, and the property has not been laid out into town lots, and could not be profitably so used, it ought not to be so taxed for city or town purposes. Such taxation is palpably unjust, and would be the taking of private property for public use without those corresponding benefits, actual or presumed, which constitute the sole basis of municipal taxation." (12 Bush, 421.)

The Kentucky doctrine, and the fact that it was the

settled law of that State, was recognized and referred to by this court in Kelly v. Pittsburg (104 U. S., 81), and the difference between the settled law of Kentucky and the rule enforced in Illinois and Missouri accounts for the different rule of taxation applied in the Louisville bridge case and in the case of the St. Louis bridge (12 N. E. Reporter, 723).

This doctrine, thus established, applies to bridges spanning the Ohio river, so far as they lie north of low water mark on the Kentucky shore. This proposition is settled by the opinion in this case, as well as by the case of the Louisville Bridge Company.

These settled rules of constitutional construction entered into and became part and parcel of the contract of the Henderson Bridge Company with the State, which was consummated by the acceptance of the charter of 1872, and the expenditure of its moneys in the erection of its bridge.

In Douglas v. Pike County (101 U. S., 687), this court said:

"After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment."

"So far as this case is concerned we have no hesitation in saying that the rights of the parties are to be

determined according to the law, as it was judicially construed to be, when the bonds in question were put on the market as commercial paper."

In Olcot v. Supervisors (16 Wallace, 690), the rule was thus described:

"Parties have a right to contract, and they do contract in view of the law as declared to them; when their engagements are formed nothing can justify us in holding them to any other rule."

So when constitutional limitations have been settled and declared by a long and unbroken line of judicial decisions, they become essentially parts of the organic law, as much so as the text itself, and enter into and become parts of every contract made, in view of the settled rule of judicial interpretation. And especially so when, as in this case, the State is one of the parties to the contract.

The answer of the Bridge Company sets out the facts, and the uncontradicted testimony in the record proves all that is necessary to show that so much of the bridge structure as spans the bed of the Ohio river was constitutionally exempt from municipal taxation. In connection with these facts it was also averred that the portion of the bridge structure in question was erected with the consent of Congress; that the Ohio river is a navigable stream, under the control and jurisdiction of the United States, and the bridge a means of inter-State commerce, used for the sole purpose of trans-

porting passengers and freight in railroad cars between the States of Indiana and Kentucky, and that, by reason of all these things, for the city of Henderson—

"To tax and subject that part of said bridge would be violative of the Constitution of the United States, the laws of Congress and of defendant's rights in the premises."

The answer also contains the averment, "that when the Bridge Company constructed said bridge it was the settled law of the State of Kentucky that so much of its bridge and property as were erected and stood across the Ohio river was not liable to municipal or city taxation, it having been so decided," &c.

This much in regard to the at empt by the Bridge Company to plead and rely upon its contract, and the protection afforded the obligations thereof by the Constitution of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The plaintiff in error, the Louisville & Nashville Railroad Company, was made a party defendant in the circuit court. Its petition and answer are to be found on page 35 of the printed transcript. It pleads the settled law of Kentucky, and avers that, relying thereon, and upon the faith of the fact that the bridge spanning the Ohio river was not, and would never be, legally liable to be taxed by the city of Henderson, it, on the 27th of February, 1884, entered into a contract with the Bridge Company for the maintainance and

operation of the bridge and connecting railroad tracks, and among other things agreed and undertook, in consideration of the sum of $10,000 per year, to keep the bridge structure and connecting road-beds in repair, and to pay all taxes legally imposed upon the track and bridge during its said contract, which was to continue until September 1, 1931, and it complained:

"That to grant the relief prayed for, or any part thereof, would be a direct impairment of the obligation of said contract between the petitioner and the Henderson Bridge Company, and violative of the rights of this petitioner."

For the plaintiff in error it is claimed that the exemption from taxation in favor of the Bridge Company was as complete and perfect as though it had been granted by the express provisions of the charter of 1872, and more effective, because not subject to the power of revocation by any or all the departments of the State government.

STATE LAWS IMPAIRING THE OBLIGATION OF THESE CONTRACTS.

It is claimed by the defendants in error, and it was decided by the Kentucky courts, that the taxation complained of was authorized by, and intended to be authorized by the two city ordinances, exhibits D and E. Except for those ordinances no taxes could have been levied by the city in the years 1886 and 1887

upon any property. The validity of those ordinances was necessarily before the circuit court when this cause was tried, and no judgment could have been given for the city of Henderson without determining that the ordinances were the laws of the State, and that they did not impair the obligations of the contracts relied on by the two plaintiffs in error. The same question must have been before the Court of Appeals, and must have been decided in the same way. It is plain, therefore, that the pleadings presented a Federal question to the State courts, and that those courts decided that question against the rights of the plaintiffs in error, and in favor of the validity of the two city ordinances. Those ordinances were in question on the ground of their repugnancy to the constitutional inhibition upon the States to make laws impairing the obligation of contracts, and that ground of objection was overruled. All this being true, it is immaterial whether the question was raised by express language or by reasonable implication. If it did arise, and was decided adverse to the right claimed under the Federal Constitution, that is sufficient.

"The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation this court is authorized to interfere. The form and

mode in which the Federal question is raised in the State courts is of minor importance, if, in fact, it was raised and decided." Murray v. Charleston, 96 U. S., 432; Williams v. Bruffey, — Ib., 176; Water Works v. Sugar Refinery, 125 U. S., 31.

The record here presents a case in which a Federal question did arise, in which it was necessary the same should be decided, and in which it was decided against a right claimed by the plaintiffs in error under the Constitution of the United States. This summary, founded as it is upon the record of the cause, is conclusive as to the jurisdiction of this court.

CLAIM OF DEFENDANT IN ERROR.

The point chiefly relied upon by defendant in error is the second proposition. That is, that the Court of Appeals—

"Based its opinion chiefly upon the construction of the contract of February 11, 1882, construing it as an agreement upon the part of the Bridge Company to pay the taxes. The construction of that contract by the State court can not, under the facts of this case, and the allegations of the answers be reviewed by this court. (Defendant's printed brief, page 7).

Counsel cite cases to prove that the record must show, not only that a Federal question was presented and decided by the State court, but that its decision was necessary to the determination of the cause, "or that the judgment could not have been given without

deciding it." In Johnson v. Risk, 137 U. S., 306, this court, approving Klinger v. Missouri, 13 Wallace, 257, said that where there—

"Is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because when put to inference as to what points the State court decided, we ought not to assume that it proceeded on grounds clearly untenable."

The contention for defendant in error is that the State court conceded the constitutional inhibition upon the city of Henderson to tax, for municipal purposes, that part of the bridge structure spanning the bed of the Ohio river, and, therefore, that such constitutional inhibition entered into and constituted part of the contract between the State and the Bridge Company, implied from the acceptance of the charter of 1872, and then rested its judgment upon a supposed contract between the Bridge Company and the city of Henderson, evidenced by the clause of the ordinance granting the right of way, reading thus:

"Nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approach to said bridge, or any building erected by said Bridge Company, within the corporate limits of said city, the bridge itself, and all appurtances thereto within the limits of said city."

It is a novel application of the rules of construction, to hold, that by a precautionary condition against the possible waiver of a right the party may have, and does not intend to surrender, he can and does thereby secure a new and independent right. And the novelty is all the greater when, as in this case, the condition is intended for the benefit of a municipal corporation that has, and can have no rights other than those confered by legislation, to hold that, in virtue of the condition against the possible waiver, it can and does secure a right, legislative in its character, that the State Legislature could not have constitutionally conferred by express legislation.

The proposition would be treated as so utterly untenable as not to require discussion, if it were not for the fact that the opinion filed by one of the judges of the Court of Appeals and seemingly concurred in by another judge, gravely states this, as the ground upon which, at least a part of the court rested the decision affirming the judgment of the circuit court of Henderson county.

An examination of the record will show, however, that one of the judges of the court (Judge Pryor) dissented from the judgment of affirmance; that the Chief Justice filed a separate opinion and based the decision, so far as he was concerned, upon the broad ground that the bridge structure was within the corporate limits of

the city, and received such benefits from the municipal government as to render it legally and justly liable to pay municipal taxes. Whether Judge Lewis concurred with the Chief Justice or joined in the opinion assumed by counsel for defendant in error to be the principal opinion, the record does not show. But as he dissented in the Louisville Bridge case upon the ground stated in general terms by the Chief Justice in his separate opinion, the fair inference would be, that he concurred with the Chief Justice rather than with the opinion declaring that *prima facie* the bridge structure was not constitutionally subject to municipal taxation, and asking the question :

"Has the appellee the power to tax said property by reason of a contract made with the appellant?" (page 76) and then proceeding to decide that, notwithstanding the constitutional inhibition, the city government secured by contract a right of taxation the Legislature had no constitutional power to confer.

It is axiomatic that taxes are not founded on contract. They owe their existence to legislation, and a municipal government can acquire no power of taxation the Legislature can not constitutionally delegate. If this court can look to the opinions of the judges to ascertain the ground upon which the judgment of the Court of Appeals was rested, it will find that the circuit judge wholly ignored all idea of contract (see opinion, page 40), as did also the Chief Justice of the Court of Appeals; that Judge

Pryor dissented, and there is nothing in the record to show whether Judge Lewis concurred in the reasoning of the Chief Justice, or in that of the supposed principal opinion, and no ground whatever for inferring that he receded from the views expressed by him in his dissenting opinion in the Louisville Bridge case.

THIS COURT NOT BOUND BY THE DECISION OF THE STATE COURT UPON THIS QUESTION.

Whether or not at the time the ordinances providing for the taxation in contest were adopted, there was in existence a contract between the State and the Bridge Company, or a contract between the two plaintiffs in error, the obligations of either of which could not be impaired by State legislation, or State authority, is a question to be decided by this court.

"This court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the State courts, giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation." Dalmer v. Insurance Company, 14 Wallace, 688.

The rule and the reason therefor were thus stated in Jefferson Bank v. Shelly, 1 Black, 436:

"Of what use would the appellate powers of this

court be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide independently of all adjudication by the Supreme Court of a State, whether or not the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State. It was never intended, and can not be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the United States follow the Supreme Court of a State in such matters when it entertains a different opinion." See also Bridge Proprietors v. Hoboken, 1 Wallace, 116.

This court will determine what, if any, effect the acceptance of the provisions of the city ordinance granting the right of way had upon the pre-existing contract right of the Bridge Company to exemption from municipal taxation. This it must do in deciding whether that contract was in force, and what its obligations were at the times when the two taxing ordinances for 1886 and 1887 were adopted. To permit the State court to settle conclusively that the original contract was abrogated, and its obligations released by the acceptance of the ordinance granting the right of way, would be to abandon the right this court has always jealously asserted (when the question before it was the impairing of the obligation of a contract by State legislation), to ascertain whether there was a contract to be impaired.

This court will take into consideration the provisions of the charter of 1872, the settled construction of the Constitution of the State of Kentucky; the agreement between the two plaintiffs in error of date February 27, 1884; the ordinance of the city of Henderson assuming to grant certain privileges to the Bridge Company and the acceptance thereof by that company, and decide for itself whether, all these things considered, there was in existence in 1886 and 1887 a contract or contracts, the obligations of which were impaired by the two taxing ordinances, as they have been construed and adjudged to be enforced by the Kentucky Court of Appeals.

EFFECT OF RIGHT OF WAY ORDINANCE.

The condition, inserted into the ordinance granting the right of way to the Bridge Company, by which it was declared that the right to tax the bridge was not to be treated as waived, does not import a demand by the city that the Bridge Company should consent to any particular character of taxation, much less that it should consent to taxation that the city could not otherwise impose, and could not be constitutionally authorized to impose by the State Legislature. The acceptance of that ordinance, and the agreement to keep its terms and conditions, do not import a promise by the Bridge Company to pay the taxes in contest or any particular taxes. It will not do to say that because

the condition against the waiver can have no effect, unless construed to authorize the imposition of the taxes in contest, that, therefore, it must be so construed in order to avoid the conclusion that sensible men, in negotiating an important business transaction, "engaged in a mere *nudum pactum*." (Transcript, page 78.) This seems to be the ground upon which the principal opinion of the Court of Appeals placed the implication of the supposed contract. It is said in that opinion that—

"When it is considered that the right to tax the bridge to the Indiana shore might be legitimately obtained by contract, and that the appellee granted to the appellant rights and privileges essential to its enterprise, designed to make money, and is making a large per cent., it is entirely reasonable to suppose that the appellee would contract for the right to tax the appellant, in consideration of granting these essential rights and privileges by which the appellant acquired the right to construct and operate so profitable a business enterprise."

The act of 1872 (printed as a supplement hereto) conferred upon the Bridge Company all the rights, powers and privileges necessary for the construction of the bridge, extending from some convenient point "within the corporate limits of the city of Henderson" to the Indiana shore, and this independent of any consent upon the part of that city.

At the time the grant was made the company was

not making money at all, and no one could divine in advance whether it would ever make "a large per cent.," and it was not true as a legal proposition "that the right to tax the bridge to the Indiana shore might be legitimately obtained by contract."

The power of taxation is strictly legislative. It is vested exclusively in the legislative department of the government. (Meriwether's Case, 102 U. S., 472; Thompson v. Allen County, 115 U. S., 550; Heine v. Levee Comps., 19 Wallace, 660, 661; Baldwin v. Hewitt, 11 Ky. Law Rep., 414.)

"It is a principle, universally declared and admitted, that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably given. Such authority is wholly statutory, and must be clearly given and strictly pursued." (Caldwell v. Rupert, 10 Bush, 182; Kemper v. Louisville, 7 Bush, 599; Dillon on M. Corporations, &c., 763.)

That a property owner may estop himself to controvert the legality of an ordinance, providing for a local improvement that benefits his property, or to resist the payment of the assessment made to pay the expense of such improvement, need not be denied. There is an essential difference between a tax and a local assessment and rules that may be applied to the one are wholly inapplicable to the other. A tax originates with the government and is imposed by it. It

is not founded in contract, and does not depend upon the tax-payer's consent. It operates *in invitum*, and has none of the essential characteristics of a debt or contract obligation.

A municipal corporation can no more acquire by contract the legislative right to levy and collect a particular tax, or to impose general municipal taxation upon property otherwise exempt therefrom, than it can acquire by contract the right to exercise judicial or executive functions.

It may be, that where a city government has the discretionary power to grant or refuse the use of its streets or public grounds to a railway, or bridge corporation, it may lawfully exact the payment of a yearly rental or royalty for the use granted. But there is no pretense there was any such contract stipulation in this case. The claim here is the right to tax, and the petition filed by the city seeks to enforce that alleged right. The claim is not based upon any valid contract or estoppel. In the petition, the ordinance and the condition against waiver are substantially set out, but there is no averment that their acceptance by the Bridge Company secured to the city the contract right to tax the bridge structure. The averment upon which that right must depend is, that—

"The plaintiff caused said bridge to be assessed by the city assessor for taxation to low water mark on the

Indiana shore of the Ohio river, like other property of said city; for the year 1885 and as provided for in the acts aforesaid, at a valuation of six hundred thousand dollars; * * * and for the years 1886–7 at a valuation each year of one million ($1,000,000) dollars, * * to pay the interest on the bonded indebtedness aforesaid and to defray the ordinary expenses of the city government, and to pay the tax for repairing and improving the gas-works and to defray the annual expenses of said public schools."

The ordinances aforesaid, which the city averred provided for this taxation, are set out in the petition, and no other or different authority than those ordinances was claimed or relied on when the petition was drafted and the suit instituted. The theory of the contract right to tax, was evolved pending the litigation by the difficulties growing out of the settled law of Kentucky, as it was applied in the Louisville bridge case.

The plaintiffs in error insist that nothing contained in the ordinance granting the right of way either did or could destroy, or in any way abridge, the constitutional, and, therefore, the contract right of the Bridge Company to exemption from taxation of so much of the bridge structure as spans the bed of the Ohio river: and they insist that even if the Appellate Court of Kentucky had in terms rested its decision upon the effect of the supposed contract sought to be implied from the conditions and provisions of the city ordinance granting the right of way,

and the question was not one this court is required to decide for itself, the ground of the State decision would not be deemed or treated as sufficiently broad and tenable to warrant this court in refusing to take and exercise jurisdiction.

But as has already been seen the question whether there was an existing contract in force, and what its obligations were at the time of the adoption of the objectionable tax ordinances, this court will decide for itself.

BRIDGE BUILT UNDER AUTHORITY OF THE UNITED STATES.

Another Federal question presented was, that the authority of the United States was invaded by the action of the defendant in error in assuming to tax an avenue, or means of inter-State commerce, constructed in and over navigable inter-State waters under the superior jurisdiction of the Federal government. The bridge was constructed under the laws of Congress, and spans one of the great rivers of the Union. Five of the largest States border upon it. The judgment of the State court assumes that this river is not only part of Kentucky, but part of the territory subject to the taxing power of the municipal government of the city of Henderson. Whatever may have been the rights of Virginia as to this river at the outset, it was by the compact between Virginia and Kentucky, so far as the use and navigation were con-

cerned, dedicated to all the citizens of the United States, and it was declared in this compact (section 11) that "the respective jurisdictions of this Commonwealth (Virginia) and of the proposed State (Kentucky) on the river as aforesaid shall be concurrent only with the States which may possess the opposite shores of the said river." Under and in virtue of this dedication, the river was made, in a political sense, that which nature had already prepared it for—a great channel of commerce, free to all the people of the United States who may choose to use it, and subject to the superior jurisdiction of the Federal government. The islands in the river remained subject to the territorial jurisdiction of Virginia and Kentucky, but the waters, and the lands covered by the waters, passed to the sole and exclusive jurisdiction of the United States. The piers of the bridge and the superstructure were erected with and because of the consent of the Federal government. They exist for the purposes of inter-State commerce, and are not subject to be taxed out of existence by the municipal government of the city of Henderson. To admit the power of the State to confer such authority upon the municipality is to admit that which will necessarily result, the taxing to the limit of its capacity to pay an artery of inter-State commerce, which, though technically within the territorial limits, is in no proper sense part

or parcel of the municipality of the city of Henderson. The bridge receives no benefits from the city government, and, from the nature of things, can receive none. A glance at the map to be found between pages 26 and 27 of the printed transcript, will demonstrate the preposterous character of the claim, that the bridge structure north of low water mark on the Kentucky shore, receives benefits from the city government corresponding in any degree whatever to the burden sought to be imposed. In this connection the attention of the court is also called to the depositions of Eastwood and Bradford, the only witnesses who testified in the cause.

RAILROAD, WATER, GAS, SCHOOL AND FUNDING BOND TAXES.

The supposed principal opinion of the Court of Appeals treats the taxes levied against the entire bridge structure, on account of water works, railroad, school and funding bonds, and for school purposes as enforceable under the settled law of Kentucky. It makes no reference whatever to the fact that similar taxes were sought to be collected in the Louisville Bridge case.

The following is one of the tax bills sued on in that case :

TAXES 1874 ON A VALUATION OF $750,000 00.

City Tax	85c	
House of Refuge	5	
Sewer	8	
Street Cleaning	8	on $750,000 00 . . $9,675 00
Footway	2	
Street Repairing	6	
Street Reconstruction	15	
School Tax on $750,000 00		$1,875 00
Institution Bonds	2c	
Improvement Bonds	3	
City Hall Bonds	3	
Reconstruction Bonds	3	on $750.000 00 . . $3,975 00
Road Bed Bonds	2	
Sinking Fund Bonds	40	
E. & P. R. R. Tax, 1st issue, on $750,000 00		$750 00
E. & P. R. R. Tax, 2d issue, on $750,000 00		750 00
L., N. A. & St. L. R'y Tax on $750.000 00		375 00
Total for 1874		$17,400 00

From these statements it appears that the taxes sought to be levied by the city of Louisville against the Louisville Bridge are almost identical in the nature of their object and purpose with the taxes involved in this case, except that in the case of the Louisville Bridge there does not appear to be a levy distinctly stating that it was for water works bonds, as there is in this case. But there is a sinking fund tax of 40 cents levied, and out of that, the interest on the water works bonds of Louisville were provided for.

Yet in the case of the Louisville Bridge, because of the essential differences between ordinary real estate in use as farming land, or for horticultural purposes, and the bed of a navigable stream,

under a divided jurisdiction and over which the city could exercise no municipal control, the Court of Appeals held that none of these taxes could be imposed upon that portion of the bridge structure situated north of low water mark on the Kentucky shore.

For the reasons given, the court is asked to overrule the motion to dismiss the writ of error, and to hear the cause upon its merits.

WM. LINDSAY,

Counsel for Plaintiffs in Error.

YEAMAN & LOCKETT,

Of Counsel.

APPENDIX.

CHAPTER 264.

AN ACT to incorporate the Henderson Bridge Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That Archibald Dixon, John H. Barrett, Joseph Adams, L. C. Dallam, S. B. Vance, J. F. Clay, E. L. Starling, Thos. A. Scott, E. G. Sebree, E. F. Winslow, Robert Dixon, Jackson McClain, and L. H. Lyne, and their associates, successors or assigns, are hereby constituted and declared a body-corporate, under the name and style of the Henderson Bridge Company; and by that name and style they are hereby invested with all the powers incident to corporations.

§ 2. That said company be, and they are hereby, invested with all the rights, powers and privileges necessary for the construction of, and they shall be, and they are hereby, authorized and empowered to construct, a bridge across the Ohio river, extending from some convenient point within the corporate limits of the city of Henderson to some convenient point on the Indiana side of said river, opposite to the city of Henderson; and also to purchase, or condemn by writ of *ad quod damnum*, and hold, as much real estate as may be necessary for the site of said bridge, and the sites for the

piers, abutments, toll-houses, and suitable avenues leading to the same, and such other lands as may be necessary: *Provided*, That said bridge shall be constructed so as not to obstruct navigation further than the laws of the United States shall allow.

§ 3. That said company may extend a railway over said bridge, with as many sets of tracks as may be deemed expedient; and shall have the right to fix reasonable rates of tolls for passing over said bridge, and to collect the same from all and every person or persons passing thereon, and upon all goods and chattels, vehicles and animals passing thereon, or carried thereon, of every kind and description; and for this purpose toll-gates may be erected at each or either end of said bridge; and the rates of toll shall be posted up in conspicuous places where toll is demanded.

§ 4. The capital stock of said company shall be two millions of dollars, to be divided into shares of one hundred dollars each; the manner of subscription and time of payment to be regulated by the by-laws of said company; and said company may receive real estate in payment of subscriptions, and may hold and dispose of such real estate; and may receive subscriptions of stock from the city or county of Henderson, and from any other city, county or corporation, either in or out of this State.

§ 5. That said company shall have power to borrow money on such terms, at such rates of interest, for such times, in such places, and to such amounts, as the president and directors thereof shall deem expedient; and may execute such evidences of indebtedness as may be deemed proper; and may pledge the profits, franchises, rights and credit of the corporation as se-

surety for any loans, liabilities, or contracts which they may make; and all bonds issued and made by said company, for the purpose aforesaid, shall be binding and obligatory upon such company, and may be hypothecated or sold by said company at such rates of discount as the president and directors thereof shall deem expedient.

§ 6. That the president and directors of said company shall have power to make all necessary by-laws, and to regulate, by by-laws and rules, all matters not specially provided for herein: *Provided*, Said by-laws and rules are not inconsistent with law.

§ 7. That the business of said company shall be conducted by seven directors, who shall, of their number, elect a president, and shall elect or appoint such other officers and agents as the by-laws shall prescribe.

§ 8. That the persons named in the first section of this act, or a majority of them, shall elect seven of their number, who shall be the directors of the company until their successors shall be elected and qualified; and an election of directors of said company shall be held on the first Monday in January of each year, at such place and under such regulations as may be prescribed by the by-laws of the company.

§ 9. This act is hereby declared to be a public act, and shall be in force from and after its passage.

Approved February 9, 1872.

Office Supreme Court U. S.
FILED,
NOV 21 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE HENDERSON BRIDGE COMPANY, ETC.
Plaintiffs in Error

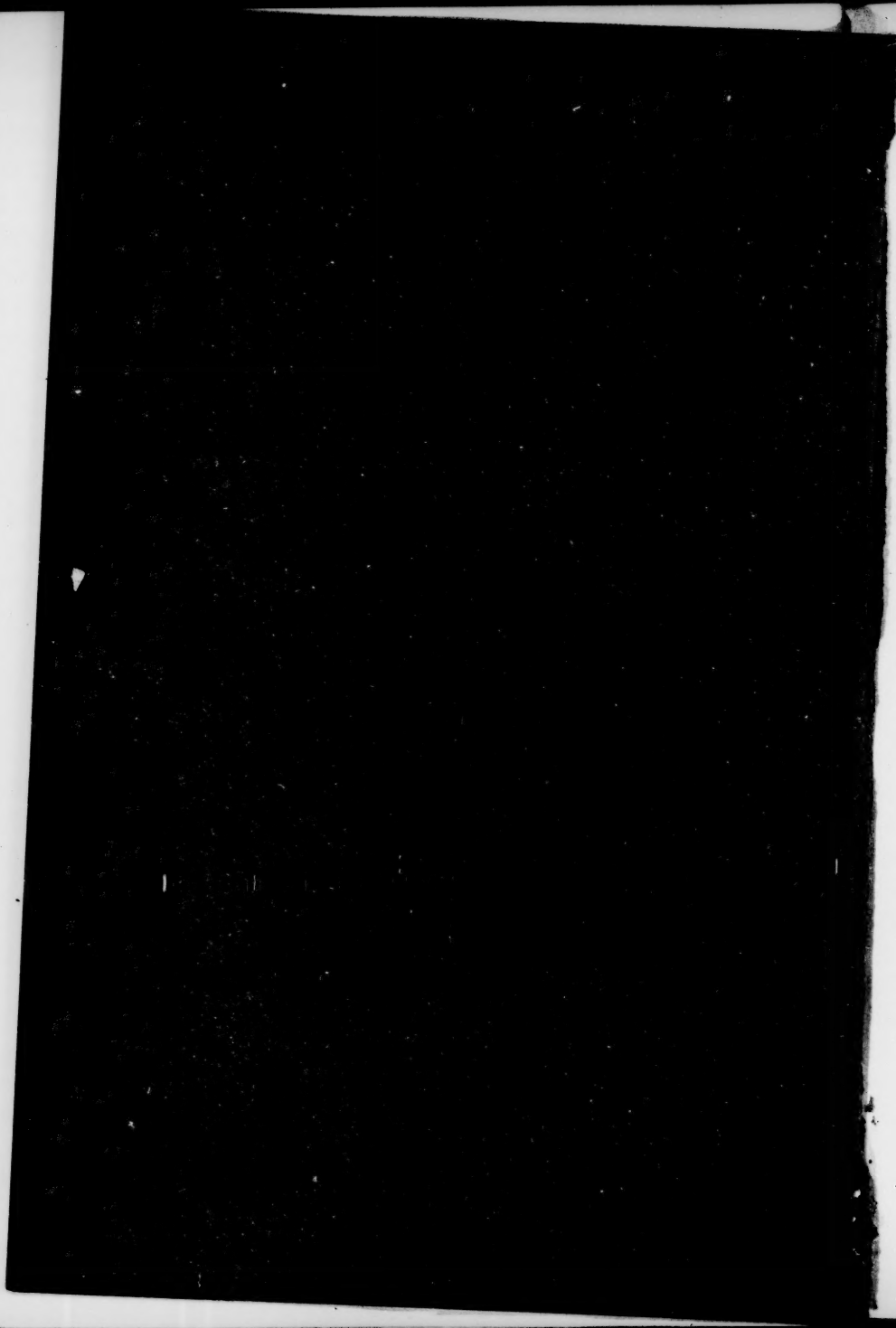
vs.

THE CITY OF HENDERSON,
Defendants in Error

Error to the Court of Appeals of Kentucky.

BRIEF FOR DEFENDANT UPON MOTION *TO DISMISS WRIT OF ERROR.*

JOHN L. DORSEY.
JNO. YOUNG BROWN.
MONTGOMERY MERRITT.
Attorneys for Defendant in Error.



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BRIEF FOR DEFENDANT UPON MOTION *TO DISMISS WRIT OF ERROR.*

STATEMENT.

The City of Henderson instituted suit against the Henderson Bridge Company to collect the taxes assessed against it, under authority of the City Charter, and several special acts of the Legislature, making the City a taxing district, and authorizing it to levy a tax upon all the property within the city boundary, for ordinary city purposes, and for school, railroad and water works purposes.

It is alleged in the petition, among other things, that the Bridge Company, on the 11th day of February, 1882, made a contract with the City under which it obtained the right to erect the bridge where located, and by which it was granted 300 feet above and 100 feet below the bridge for the purpose of erecting grain elevators, etc., and that it was expressly agreed in said contract that nothing therein shall be construed as waiving the right of the City to levy and collect taxes against the bridge.

The Bridge Company in its answer, (paragraph 9,) after setting forth the nature of the structure, its location, etc., alleges that for plaintiff to assume to tax and subject that part of the bridge extending across the Ohio river to low water mark would be violating the constitution of the United States and the laws of Congress.

In Paragraph 10, it alleges that the bridge receives no benefit or protection from the city, and for the City to tax it, would be taking private property for public use without compensation, and would be in violation of Article 5, of the constitution of the United States and of the constitution and laws of Kentucky.

In Paragraph 11, it alleges that when it constructed said bridge, it was the settled law of the State of Kentucky, that so much of its bridge and property as was erected and stood over the Ohio river, was not liable to municipal or city taxation, it having been so decided by the Court of Appeals of Kentucky, in the case of the Louisville Bridge Company vs. the City of Louisville, 81 Ky., 189, and that relying on the law as being settled as aforesaid, that the bridge would not be taxed, it entered into a contract with the L & N. R. R. Co., which is specifically set forth in the answer of said company. Rec. page 30,

The L. & N. R. R. Co., filed its petition, was made a defendant, and its petition taken as its answer.

It made the same allegation as is contained in Paragraph 11, of the Bridge Company's answer, and that on the 27th day of February, 1884, it entered into a contract with the Henderson Bridge Company by which it was to maintain and operate said bridge and connecting railroad in consideration that the Bridge Company would pay it each year during the continuance of the contract, $10,000 per annum, which amount, or such part thereof as should be necessary, the Railroad Company would expend in

keeping the bridge and connecting railroad in good condition and in paying all *taxes assessed against it*, and now to permit the city to tax the bridge would be impairing the obligation of that contract and be violating a familiar provision of the constitution. It is upon this plea they hope to maintain a foot-hold in this Court.

Upon final hearing the Circuit Court rendered a judgment in favor of the City. Upon appeal to the Court of Appeals of Kentucky, the judgment of the Circuit Court was affirmed. The Court construed the contract of February 11, 1882, as an agreement on the part of the Bridge Company to pay the taxes assessed against it, and based its decision as to the city tax proper, wholly upon that ground. Rec. p. 77,

The defendants moved the Court of Appeals for a writ of error to this Court Their motion was overruled, but a like motion was subsequently granted by Justice Brewer.

Rec. p. 80,

We understand the law to be well settled, that before this Court will take jurisdiction of a case by a writ of error to a State Court, a Federal question must not only be presented and decided, but it must be the basis of the State Court's decision.

In the case of Carroll vs. Randall, 10 Peters 368, the motion to dismiss for want of jurisdiction, was argued by distinguished counsel. Justice Story, in delivering the opinion of the Court reviews all the case reported up to that time. He says "It has been uniformly held, that to give this Court appellate jurisdiction two things should have occurred and be apparent in the record.

First, that some one of the questions stated in the section (25th section of the judiciary act) did arise in the Court below. Secondly, That a decision was actually made thereon by the same Court in the manner required by the section.

If both of them do not appear in the record, the appellate jurisdiction fails.

It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the Court below; but that it is sufficient if it is clear from the facts stated, by just and necessary inference, that the question was made and that the Court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment." [16 Peters 281; 1 Wall 142.]

In Brown vs. Atwell's Adm'r 92 U. S. 229, the Court used this emphatic language:

"We have often decided that it is not enough to give us jurisdiction over the judgments of the State Court for the record to show that a Federal question was argued or presented to that Court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

"The decision must be controlling in the disposition of the cause." 98 U. S. 141.

In Detroit City Railway Company vs. Guthard, 114 U. S. 133, Chief-Justice Wait delivering the opinion of the Court, after quoting from and citing several cases, says, "The reason of the rule is obvious. Our jurisdiction for the review of a judgment of the highest Court of a State depends on the decision by that Court of one or more of the questions apecified in Section 709 of the revised Statutes, and in the way mentioned. If there has been no such decision in the suit there can be no re-examination of the judgment here. It is what was actually decided that we are to consider, not what might have been decided.

In Kruger vs. Shelby R. R. Co., 125 U. S., 46.
De Saussare vs. Gaillord, 127 U. S., 234.
Hall vs. Akers, 132 U. S., 564.
Hopkins vs. McClure, 133 U. S., 386.

This Court held that though a Federal question is involved and erroneously decided, if the case is decided on other grounds broad enough to sustain the decision, this Court would refuse to take jurisdiction.

In Knox vs. Exchange Bank, 12 Wallace 383, Justice Miller says: "But we are not authorized by the Judiciary Act to review the judgments of the State Courts, because their judgments refuse to give effect to valid contracts, or because those judgments in their effect impair the obligations of contract.

If we did, any case decided in a State Court could be brought here when the party setting up a contract, alleged that the Court had taken a different view of its obligations to that which he held.

As the Court said in Railway Company vs. Rock, 4 Wall 181, it must be the Constitution or Statute of the State which impairs the obligations of a contract, or the case does not come within our jurisdiction."

Now apply the principles which we have quoted at such length to show that this Court had uniformly adhered to them—without halt or hesitation—to the case at bar, and the Court must conclude that the record presents no Federal question, or if it does, the Federal question was not decided. They do not complain of the constitution of the State of Kentucky or any statute thereof, as violating the obligations of a contract.

Taxing the bridge would in no way be regulating com merce among the States or taxing any agency of the Federal Government. (18 Wall 29.) But it is upon Paragraph 11 of the

answer, they rely to raise a Federal question. They claim the Louisville Bridge case, 81 Ky., 189, settled the law as to this case. That case was not decided until May 30th, 1883, more than a year after the contract was made between the City and the Bridge Company.

The City of Louisville in that case, was seeking to tax the Louisville Bridge, under an amendment to the City Charter passed March 3rd, 1871, after the bridge had been erected. The Court was divided, the majority holding that the bridge, under that act was not taxable by the city. Judge Pryor said in his separate opinion, that the City had so construed the act by their failure for five or six years to assess the bridge for taxation. Judge Lewis dissenting and clearly showing in his opinion, the lack of similarity between that case and some cases where farming lands, brought against the will of the owner within the city had been exempted from ordinary city taxes. The question of contract did not arise in the case.

The taxes were not levied under special acts, like the railroad, school and water taxes are levied by the City of Henderson.

The Court makes that distinction in Courtney vs. City of Louisville, 12 Bush 419.

Lambert vs. City of Henderson, 8 Bush 607.

The Court did not intend in the Louisville Bridge case to establish a precedent for the taxation of all bridges that might be erected in the future across the Ohio river irrespective of the facts of the case

No settled policy or rule of law was established by that case. The Louisville Bridge case "stands out in unenviable solitude and notoriety." No other case so far as we are advised, has ever been decided exempting interstate bridges from municipal taxation.

The St. Louis Bridge is taxed both by St. Louis and East Louis [St. Louis Bridge Company vs. East St. Louis. 12 N. E. Reporter, page 723.]

Second: No Federal question was decided. As before stated, the Court based its opinion chiefly upon the construction of the contract of February 11, 1882, construing it as an agreement upon the part of the Bridge Company to pay the taxes. The construction of that contract by the State Court cannot, under the facts of this case and the allegations of the answers, be reviewed by this Court. [Commercial Bank of Cincinnati vs. Buchingham's Ex'rs. 5 Howard, 317.

The Court did not overrule the Louisville Bridge case. It was *not necesvary* to do so.

It is not even claimed the obligation of the contract of February 11, 1882, has been violated, but that the obligation of the contract of February 29, 1884, between the Bridge Company and the L. & N. R. R. Co. The Railroad Company knew that the City claimed the right to tax the bridge, but relying upon the law, as its advisers interpreted it, it did not think the bridge legally liable to taxation by the City. This is the substance of the plea to give this Court jurisdiction. [Knox vs. Exchange Bank 12 Wall.

We respectfully ask that the writ of Error be dismissed with damages.

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